

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

C.A.Appeal No.926/99

D.C.Mount Lavinia 17/92/P

W.David De Kosta (deceased)
No: 08/06,
Kosta Mawatha,
Kalubowila,
Dehiwala.

And 02 other

Appellants

Vs.

D.D. Somapala Wijesinghe
No: 51/1,
Siddhartha Lane,
Aththidiya Mawatha,
Wattala.

Respondent

C.A.Appeal No.926/99

D.C.Mount Lavinia 17/92/P

Before : **A.W.A.Salam, J.**
Sunil Rajapakse, J

Counsel : Ian Fernando and Keerthi Sri Gunawardena for the 1st
Defendant-Appellant.

Respondent is absent and unrepresented.

Argued &
Decided on : 19.03.2013

A.W.A.Salam, J

The appellants have filed the present appeal against the judgment of the learned District Judge dated 29.01.1999 dismissing the plaintiff's action to partition the land. In the same judgment the learned District Judge has answered certain points of contest relating to the prescriptive rights of parties in the affirmative. As far as the plaintiff's version is concerned the land sought to be partition is described in the schedule to the plaint and the corpus is depicted in plan No.38 dated 09.09.1993 made by G. Saranasena, Licensed Surveyor and Commissioner. This plan has been produced marked as X without any objection raised by the parties to the case. Further, at the commencement of the trial an admission has been recorded as regard the corpus depicted in the said plan. Admission recorded on 27.03.1997 deals with the identity of the corpus. Admission Nos.2, 3 recorded on the same day is to the effect that the person

mentioned in the plaint as the original owner in fact was the person who originally owned the land and that his rights devolved on the parties as pleaded in paragraph 1-8 of the plaint. In the course of trial on 10.03.1998 5, 6, 9, 10 and 11 defendants made a further admission admitting paragraph 17 and 18 of the plaint. These defendants once again re-iterated the admission of paragraph 1-8 of the plaint on that date. Learned Counsel for the appellants submitted that in the midst of the admission learned District Judge could not have possibly come to the conclusion that certain defendants to whom rights have been shown by the plaint and who have admitted the devolution of title as aforesaid are not entitled to in law to acquire a prescriptive title to the divided portions they claimed.

The learned District Judge in his judgment has never addressed his mind to the clear admissions made by the parties at the commencement of the trial and thereafter as to the co-ownership of the property held by the respective parties. Remarkable omission in the judgment is that the learned District Judge has not adverted his mind to the principle that cogent evidence is required to establish prescription among co-owners and in that it is indispensable that there should be evidence of ouster or something equivalent to ouster by an overt act. There has been no evidence led at the trial or any reference made in the judgment to any cogent evidence being led on the question of prescription or evidence relating to ouster by an overt act. It has been pointed out over and over again that it is

the solemn duty of the learned District Judge to investigate the title of the parties specially with regard to claim of prescription among co-owners as required in terms of Section 3 of the Prescription Ordinance. The learned District Judge has obviously failed to investigate the title on the question of prescription as required by law. In the circumstances I am of the opinion that the impugned judgment should not be allowed to remain and cries out for the intervention of Court by way of appellate jurisdiction. As failure on the part of the learned District Judge to appreciate the cardinal principle relating to prescription among co-owners and for his failure to give due effect to the admissions made by the parties, the impugned judgment is set aside and the case is sent back for re-trial.

Since the impugned judgment has been set aside by reason of misdirection on the part of the learned District Judge I do not see any reason to impose costs. Therefore I make order that the appellant is not entitled to costs.

JUDGE OF THE COURT OF APPEAL

Sunil Rajapakse, J

I agree.

JUDGE OF THE COURT OF APPEAL

KLP/-