CHARLES PERERA AND ANOTHER
v
KOTIGALA

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A. 1002/93 (F)
D.C. COLOMBO 5664/ZL
SEPTEMBER 3, 2003

Rei Vindication Action – Prescriptive possession in a vindicatory suit – Life interest holder not made a party – Is it fatal? Prevention of Frauds Ordinance, section 2 – Essential elements of due execution of a deed – Amicable partition – Delay in giving judgment – No rational analysis – Per functory judgement – Civil Procedure Code, sections 17 and 187.

The plaintiff respondent instituted action seeking a declaration of title to the land in question. The defendant-appellant disputed the identity of the corpus. The District Court held with the plaintiff. On appeal it was contended (i) that the judgment is only a recital of evidence (2) that there was a delay of more than 2 years to pronounce the judgment (3) that the plaintiff could not have acquired prescriptive title subject to the life interest of another (4) that life interest holder was not made a party (5) that there was no due execution of the deed in question, the amicable partition has not been acted upon.

Held:

i) The trial judge had considered and analysed the totality of the evidence led in this case and having analysed the evidence has come to a correct finding. He has also complied with section 187 of the Code.

ii) The delay has not caused any prejudice to the defendant-appellants, for the trial judge has carefully examined and analysed the evidence in coming to his findings.

iii) The plaintiff in this case did not claim the property on prescription but on deed No. 979/3.7.85 (P5).

iv) It was contended that the property has been gifted to the plaintiff-respondent subject to the life interest of his father. Evidence revealed that the father was present in Court at the trial stage and it appears that the plaintiff-respondent has filed this case not only to safeguard her rights but also to safeguard the life interest of her father and not to refuse, reject or deny the plaintiff's father's rights but to uphold such a right. In such cir-

cumstances, the failure to make the life interest holder a party does not vitiate the proceedings.

V) Evidence reveal that essential elements of due execution as set out under section 2 of the Prevention of Frauds Ordinance have been complied with and the fact that parties have not entered into possession of their respective lots or that some have resorted to court action and but one of the them had protested and he was discharged does not make the deed P3 invalid (amicable partition) nor does it matter that the deed was unregistered for the present action is not between co-owners who signed the partition deed but against a third party, the defendants-appellants.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *Sirajudeen* v *Abbas and another* (1994) 2 SRI LR 365 – distinguished
2. *Premasiri and others* v *Kodikara and another* (1994) 3 SRI LR 339
3. *Sideris* v Simon 46 NLR 273
4. Cader v *Marikkar* 37 NLR 257 (PC)
5. *William Brandt's Sons & Co.* v *Dunlop Rubber Co. Ltd.*, (1905) AC 454 at 462
6. *Appuhamy* v *Premalal and others* – (1984) 1 SRI LR 299

Nimal Weerasinghe for defendants-appellants

Gamin Perera for plaintiff-respondent

Cur.adv.vult

March 05, 2004

SOMAWANSA, J.

The plaintiff-respondent instituted the instant action in the District Court of Colombo seeking a declaration of title to the land described in the schedule to the plaint, ejectment of the defendants-appellants therefrom and restoration to possession thereof, damages at the rate of Rs. 250/- per month as from 12.04.1987 until restoration to possession. 01

The plaintiffs-respondents pleaded case was that one Pabilis Perera was the original owner of the land called "Mahawatta" who possessed the said land for over 50 years and thereby acquired

prescriptive rights to the entire land, that on the death of the said Pabilis Perera and his wife Misi Nona the said rights devolved on their 9 children who amicably partitioned the entire land. Plan No. 471 dated 25.05.1980 marked P4 was prepared by Kapugeekiyana, Licensed Surveyor, for this purpose and partition deed No. 42 marked P3 was executed in accordance with the said plan, that Yahanis Perera a son of the said Pabilis Perera by deed No. 979 dated 03.07.1985 marked P5 gifted his right to his daughter the plaintiff-respondent and that on 12.04.1987 the defendants-appellants forcibly and unlawfully entered the land and has commenced to possess the same.

The defendants-appellants while denying the several averments of the plaintiff-respondent set up title to the land in suit on the basis that the said land was called and known by the name 'Godaparagahawatta" and "Ketakelagahawatta" and traced the original title to one Simon Perera. It was their position that the said Simon Perera by deed No. 556 dated 01.07.1917 marked 1V1 conveyed his rights to Carolis Perera who became entitled to 9/60 shares and on his death his rights devolved on the 1st and 2nd defendants-appellants, that the said Pabilis Perera who was shown to be the original owner by the plaintiff-respondent was entitled to 1/60 share, that on the death of the said Pabilis Perera and his wife the said 1/60 share devolved on their 9 children. The defendants-appellants challenged the partition deed No. 42 by which it is alleged that for the first time identified the land in suit as Mahawatta. That the 9/60 shares of the defendants-appellants are shown as A,B,C,D and E in plan No. 2559 and that lot A of the said plan is possessed by the 1st defendant-appellant while lots B, C and D are possessed 2nd defendant-appellant and prayed that they be declared entitled to the said lots in plan No. 255 marked 1V1.

The plaintiff-respondent by her replication denied the several averments in the answer of the defendants-appellants and averred that the instant action has been filed not in relation to a land called Goadparagahawatta or Ketakelagahawatta or portion of the said land and that the deeds mentioned in the answer are not relevant to this corpus in this action.

At the trial 3 issues were raised on behalf of the plaintiff-respondent while 21 issues were raised on behalf of the defendants-appellants. At the conclusion of the trial, the learned District Judge by her judgment dated 16.08.1993 held with the plaintiff-respondent. This appeal has been lodged against the said judgment.

When the appeal was taken up for hearing parties agreed to resolve the matter by way of written submissions. It appears the main ground urged by the counsel for the defendant-appellants is that the impugned judgment cannot be supported by the evidence led in this case and that there is no proper evaluation of the totality of the evidence by the trial Judge. He submits that the trial Judge had failed to consider the documents marked and the evidence led on behalf of the defendants-appellants. That the documents marked by the defendants-appellants refer to a land called Ketakelagahawatta and Godaparagahawatta and the deeds dealing with the said land marked by the defendants-appellants are old as far back as 1912. Whereas the plaintiff-respondent plan and deeds which describe the land as Mahawatta alias Dalakiripallagahawatta is an innovation and after thought of the plaintiff-respondent.

That the trial Judge had simply dealt with the evidence led on behalf of the plaintiff-appellant without a scant reference to the evidence led on behalf of the defendants-appellants and that mere fact that there appears to have been no contradictions in the evidence led for the plaintiff-respondent is no reason to admit them without reservations, when there is uncontradicted evidence on record for the defendants-appellants too. However I am unable to agree with this submissions, for the 2nd defendant-appellant himself has admitted in his evidence that the plaintiff-respondent's predecessors in title who are also the predecessors of the witness called by the defendants-appellants, namely Eddie Perera and Edward Perera, were in possession of the corpus for over 53 years. In this respect I would refer to the learned District Judge's analysis of the evidence of the defendants-appellants witness Eddie Perera at page 270.

"පැහැදිලි හරස් ප්‍රශ්ණ වල දී ගෙන ඇති යමතය වන්නේ 'පැ3' දරණ බෙදුම් ඔප්පුව අත්සන් කරන අවස්ථාවේ දී ඉඩම බෙදා වෙන් කර ගැනීමට අදහස් කර තිබුන බව මහු දන සිටිය බව හා මහු එයට එකහ වුන බවයි. 'පැ1' සහ 'පැ2'

පෙන්නා සිටින ලදුව පිලිවෙලින් ඔහුගේ පියා සහ මව මිය ගිය ස්ථානය ලෙස එම ලේඛනවල මහවත්ත කියා සඳහන් වන බව පිලිගෙන ඇත. 'පැ1' අනුව පියා මිය ගොස් ඇත්තේ 1950 ඔක්තෝබර් මාසයේය. 'පැ2' අනුව ඔහුගේ මව මියගොස් ඇත්තේ 1956 අගෝස්තු මාසයේ ය. හරස් ප්‍රශ්ණ වලදී පැහැදිලිව උත්තර දී ඇත්තේ ඔවුන් මිය ගියේ මේ නඩු කියන වත්තේ බවයි. ඔහුගේ සාක්ෂිය සමතයක් වශයෙන් ගත් කල මේ නඩු කියන ඉඩම මහවත්ත කියා 1950 දී පවා භාවිතා කර ඇති බව ඔහු පිලිගෙන ඇති අතරම, එම තත්ත්වය ඔහුගේ සාක්ෂියෙන් සනාථ වේ."

The 2nd defendant-appellant in his evidence under cross examination says as follows:

"ප්‍ර: නමා කියන්නේ පබිලිස් පෙරේරාගේ බිරිඳගේ නම මොකක්ද?
උ: මිසියා පෙරේරා දිසානායක
ප්‍ර: මිසියා පෙරේරා දිසානායක මැරුනේ මහවත්ත කියන ඉඩමේ නේද?
උ: ඔව්
ප්‍ර: මහවත්ත කියන ඉඩම තමයි මිසියාගේ ගේ තිබුනේ?
උ: ඔව්
ප්‍ර: ඒ ගේ තිබුනේ මේ කොටසේ නේද?
උ: ඔව්.
ප්‍ර: තමාලා කියන හැටියට පබිලිස්ගේ බිරිඳ පදිංචි වෙලා සිටියේ ඒ කොටසේ තිබුන ගෙදරයි?
උ: එහෙයි.
ප්‍ර: ඒ ගෙදරතමයි පබිලිස්ගේ බිරිඳ මැරුණේ?
උ: එහෙමයි.
ප්‍ර: තමා පබිලිස්ගේ බිරිඳගේ මරණ සහතිකය ඉදිරිපත් කලා එවිවින් පෙරේරාගේ සාක්ෂි දෙන අවස්ථාවේද?
උ: ඔව්.
ප්‍ර: ඒකේ මේ ඉඩමට නම දලා තියෙන්නේ මහවත්ත කියලා?
උ: ඔව්.
ප්‍ර: මිසියා පෙරේරා මැරිලා කොපමණ කල් වෙනවද?
උ: හරියට කියන්න දන්නේ නැහැ.
ප්‍ර: පබිලිස් පෙරේරා මැරුනේ මේ ඉඩමේ ද?
උ: ඔව්.
ප්‍ර: පබිලිස් පෙරේරා මැරෙන කොට මරණ සහතිකයේ තිබෙන්නේ මහවත්ත?
උ: ඔව්.
ප්‍ර: ඒ කොටස මරණ සහතික වල තිබෙන්නේ මහවත්ත කියලා සඳහන් කරලා?
උ: ඔව්.

ප්‍ර: තමා කියන්නේ ඒක හරිද?
උ: ඒක වැරදියි."

At pages 236 and 237 is stated:

"ප්‍ර: මේ අවස්ථාවේ දී පැමිණිල්ලෙන් කියන්නේ එඩිවඩ් යහ එඩී පෙරේරා තමාට සාක්ෂි දෙන්නේ තමාගේ අයිතිවාසිකම් එඩිවඩ් පෙරේරාට යහ එඩී පෙරේරාගේ පුතාට ඔප්පුවකින් පවරා තිබෙන නිසා කියා."

උ: ඇත්ත වශයෙන් ඒක සත්‍යයක්. ඒ මොකද, අවුරුදු 53 ක් ඉදල ඒ අය මේ විදියේ නවුවත් පැවරුවා නම් කෘතඥණ සැලකීමක් වශයෙන් ඒ අයට පවරන එක මගේ යුතුකමක්. 130

ප්‍ර: තමා අංක 376 සහ 1987 ජූලි මස 05 වන දින දරණ ඔප්පුවෙන් තමාගේ මේ නවුවේ තිබෙන 'ඩී' අක්ෂරයේ තිබෙන සියළු අයිතිවාසිකම් පවරා තිබෙනවා කොටිගලගේ එඩී පෙරේරාට?

උ: කොටසක් දුන්නා.

ප්‍ර: 1987 ජූලි මස 05 වන දින කොටිගලගේ සයිමන් පෙරේරා මහතුගේ උත්තරයේ සඳහන් 'ඩී' අක්ෂරය අංක 376 දරණ ඔප්පුවෙන් කොටිගලගේ එඩී පෙරේරාට පවරපු ඔප්පුව බව පැ8 වශයෙන් ලකුණු කරනවා?

ප්‍ර: ඒ වගේම තමා අංක 375 සහ 1987 ජූලි මස 05 වන දින දරණ තමා 'ඒ' අක්ෂරය දරණ කොටස තමා පැවරුවා කොටිගලගේ නිරෝෂන් පෙරේරාට. ඒ කියන්නේ එඩිවඩ් පෙරේරාගේ පුතාට? 140

උ: ඔව්.

එම කොටස මම 'පැ9' වශයෙන් ලකුණු කරනවා.

Also in page 240 of the brief it is stated:

ප්‍ර: මේ නවුවේ තමා සාක්ෂි දෙන්න ඉදිරිපත් වුනාට මේ උත්තර බඳින අවස්ථාවේ දී අයිතිවාසිකම් තිබුනේ එඩිවින් පෙරේරාටයි, එඩී පෙරේරාගේ පුතාටයි නේද?

උ: ඔව්.

Accordingly it appears that the 2nd defendant-appellant himself has admitted in his evidence that the plaintiff-respondent's predecessors who are also predecessors of the witnesses called by the 150 defendants-appellants Eddie Perera and Edward Perera were in possession of the land in suit at least from 1950. In the light of the said evidence of the 2nd defendant-appellant and the reasoning in the judgment of the learned District Judge, the argument of the

counsel for the defendants-appellants that the impugned judgment cannot be supported by the evidence and that there is no proper evaluation of the totality of evidence has to fail. It is also to be noted that the finding of the learned District Judge that the land in suit is Mahawatta is well founded not only by the evidence of the plaintiff-respondent but also by the admissions of the 2nd defendant-appellant himself. The learned District Judge in his judgment on page 272 of the brief makes the following observation:

"මෙහි දී පැමිණිල්ලේ නඩුවේ ඉදිරිපත් වී ඇති සාක්ෂි වලින් පැමිණිල්ලේ උප ලේඛණයේ විස්තර වන්නේ මහවත්ත හෙවත් උලකිරිපැල්ලගහ වත්ත බවත්, නඩුවේ විෂය වස්තුව හදන්නේ එකී නම් වලින් හඳුන්වන ඉඩමේ පැ4 දරණ පිඹුරේ පෙන්නා ඇති කැබලි අංක 07 බවත් පෙනේ. එමෙන්ම කොටිගලගේ පබිලිස් පෙරේරා වන මුල් බුක්නි අංක 07 බවත් පෙනේ. එමෙන්ම කොටිගලගේ පබිලිස් පෙරේරා වන මුල් බුක්නි විඳින්නන් විසින් බුක්නි විඳ ඇත්තේ එකී මහවත්ත හෙවත් දලකිරිපැල්ලගහ වත්ත නැමැති ඉඩම බවට ඉදිරිපත් වී ඇති සාක්ෂි වලින් සෑහීමකට පත් විය හැකිය. විශේෂයෙන් පැ1 සහ පැ2 දරණ ලේඛණ අනුව ද ඒ තත්ත්වය පැමිණිල්ලේ ප්‍රධාන සාක්ෂි කරු වන නෝබට් පෙරේරා නැමැති පැමිණිලිකාරියගේ පියාගේ සහෝදරයාගේ සාක්ෂියෙන් ඔවුන්ගේ පියා සහ මව මියගොස් ඇත්තේ පිලිවෙලින් 1950 සහ 1956 වන අතර ඔහු මිය ගොස් ඇත්තේ මහවත්ත නැමැති ඉඩමේ දී බවත් එම සාක්ෂියෙන් හා එකී පැ1 හා පැ2 න් සනාථ වේ. මේ තත්ත්වය 2 වන විත්තිකරුගේ සාක්ෂියේ දී ද ඔහු ද සනාථ කොට ඇත. විත්තිකරුවන්ගේ නඩුවේ ඉදිරිපත් වූ සාක්ෂියකින් උත්තර 5 වන උපලේඛණයේ විස්තර වන අංක 2557 පිඹුරේ කැබලි අංක ඒ ගොඩපරගහවත්ත සහ කැටකැලගහවත්ත නැමැති ඉඩමේ කොටසක් බව සහ හෝ එය 1 වන විත්තිකරුට හිමිවීමක් ගැන ප්‍රමාණවත් සාක්ෂි ඉදිරිපත් වී නැත."

Counsel for the defendants-appellants also submitted that the trial Court had not weighed the totality of evidence in the case and the reasons as to why evidence led on behalf of the plaintiff-respondent was trustworthy had not been stipulated in the judgment also that there was only a recital of evidence without a rational and logical analysis. However on an examination of the evidence led and the judgement of the learned District Judge, I am unable to agree with the above submissions, for the learned District Judge has considered and weighed the totality of evidence led in this case and having analysed the evidence has come to a correct finding. I might also say that the learned District Judge has complied with the provisions contained in section 187 of the Civil Procedure Code based on material available the learned District Judge has on a balance of

probability come to a correct finding that the land in suit is Mahawatta.

While conceding that in a *rei vindicatio* action the burden is on the plaintiff to establish his title to the land he claims and not for the defendant to show that the plaintiff has no title. In the instant action, I would hold that the learned District Judge has come to a correct finding that the plaintiff-respondent has proved her title and the learned District Judge has given adequate reasons for his findings.

It is also contended by the counsel for the defendants-appellants that the judgment in the instant case was pronounced more than two years after the evidence was led which would result in fading away the salient points of evidence from the mind of Court. It is to be seen that the judgment has been pronounced more than 2 years after evidence it appears to me that the delay has not caused any prejudice to the defendants-appellants, for the learned District Judge has carefully examined and analysed the evidence in coming to his findings.

As for the legal title pleaded by the defendants-appellants, I would say as stated above the 2nd defendant-appellant himself admitted that he has transferred lots C and D in plan No. 2557 marked 1V2 to their witnesses Eddie Perera and to his brother's son before filing the present case. On the other hand again as stated earlier the 2nd defendant-appellant in his evidence has accepted that the plaintiff-respondent's predecessors were in possession of the land in suit for a long period of time. In the circumstances the 2nd defendant-appellant is not in a position to plead legal title to the said lots and as a result his claim in reconvention has to fail.

Counsel has also urged this Court to consider whether the trial Judge had applied the principles of law as laid down in *Sirajudeen* v *Abbas*[1] and *Premasiri and others* v *Kodikara and another*[2] when the judgment was given in favour of the plaintiff-respondent. In the first case cited by the counsel for the defendants-appellants *Sirajudeen* v *Abbas (supra)* the Supreme Court dealing with prescriptive title in a vindicatory suit held where the evidence of possession lacked consistency the fact that occupation alone or the payment of Municipal rates by itself is insufficient to establish prescriptive possession. However in the instant case, till 12.04.1987 no one had challenged

the possession, title or ownership of the plaintiff-respondent. Hence the said case has no application to the instant case. For in that case the paper title of plaintiff was proved and it was for the defendant to prove he had acquired prescriptive title.

In the case of *Premasiri* v *Kodikara* (supra) the Court of Appeal dealt with the question of paper title and prescription in a declaration of title case and held that the 2nd plaintiff could not have acquired prescriptive title subject to the life interest of the 1st plaintiff. It was further held that in fact neither the 1st plaintiff nor the 2nd plaintiff had acquired prescriptive title to the land. Though this finding appears to lay down a principle that one cannot acquire prescriptive title subject to the life interest of another the facts of that case reveal otherwise. In that case the facts were:

> "The plaintiffs-respondents instituted this action seeking a declaration that the 2nd plaintiff-respondent is entitled to the land described in the schedule to the amended plaint subject to a life interest in favour of the 1st plaintiff-respondent on the basis that one Nandasena Pulasinghe the father of the 2nd plaintiff-respondent and the husband of the 1st plaintiff-respondent and who was subject to the Kandyan Law had acquired prescriptive title to the said land during his life time had died leaving his daughter the 2nd plaintiff-respondent and his widow the 1st plaintiff-respondent."

The learned District Judge in his judgment has held that Nandasena Pulasinghe has not acquired prescriptive title to the land in question but had answered issue No. 1 viz: is the 2nd plaintiff entitled to the land describe in the schedule to the plaint subject to a life interest in the 1st plaintiff as set out in the plaint? in the affirmative and added that he accepts that the 2nd defendant had acquired prescriptive title subject to a life interest in the 1st plaintiff. In considering the correctness of this finding of the learned District Judge, Edussuriya, J. states at page 342:

> "I may add that even though there is a finding by the learned District Judge that Nandasena Pulasinghe had no title, learned District Judge has held that the 2nd plaintiff has title subject to a life interest in the 1st plaintiff. This

cannot be, since under the Kandyan Law the 2nd plaintiff (daughter) could have got title subject to life interest in the 1st plaintiff (widow) only if the land was the acquired property of the deceased. One cannot understand how on a finding by the learned District Judge that the 2nd plaintiff had acquired prescriptive title the learned District Judge could have held that the 1st plaintiff had a life interest therein.

In any event, even the finding by the learned District Judge that the 2nd plaintiff had acquired prescriptive title is confusing since at page 168 of the brief the learned District Judge has contradicted himself by first holding that the 1st plaintiff had acquired prescriptive title and then holding that the 1st plaintiff had possessed for a period of 17 years on behalf of the 2nd plaintiff and thus the 2nd plaintiff has acquired prescriptive title and then going on to state that the parties are subject to Kandyan Law and therefore the 2nd plaintiff (daughter) is entitled to the land subject to a life interest in the 1st plaintiff (widow). At this point the learned District Judge appears to have lost sight of his finding that he had held that Nandasena Pulasinghe had not acquired title by prescription."

It is be seen that in the instant case the plaintiff-respondent is not claiming the property as prescriptive title but on deed No. 979 dated 03.07.1985 marked P5. However paragraph 9 of the plaint reads as follows:

"9 පැමිණිලිකරු අවධාරනයෙන් කියා සිටින්නේ 02 වෙනි ඡේදයේ යඳහන් ඉඩම ඇය සහ ඇයගේ පෙර හිමිකරුවන් අත් පියළු දෙනාටම හිමිකම් ලබාගෙන ඇති බවයි."

With regard to the said pleadings in paragraph 5 of the plaint it is relevant to consider the observations of Edussuriya, J. in *Premasiri* v *Kodikara* (*supra*) at page 341:

"In cases where plaintiffs claim "paper" title on the basis of a devolution of title either by inheritance or purchase

from a person who had title in order to support that title, often a plea of prescriptive title by virtue of possession by the plaintiff and his predecessor in title is also pleaded and in consequences of such a plea an issue on the lines of issue 2 above is raised or framed."

In the circumstances it appears that the case can be distinguished from the instant action.

The counsel for the defendants-appellants also referred to *Sideris* v *Simon*(3) wherein the head note reads:

"In an action between co-owners the question whether a presumption of ouster may be made from long continued and undisturbed and in uninterrupted possession is one of fact, which depends on the circumstances of each case."

However in the instant action the defendants-appellants do not claim to be co-owners and the said decision has no application to the instant action.

Another matter being canvassed by the counsel for the defendants-appellants is that Yohanis Perera having a life interest in the land conveyed by deed No. 979 of 03.07.85 marked P5 (assuming he had a right but not concluding) should have been made a party. The failure vitiates the entire proceedings. However I am unable to agree with the counsel. It is conceded that the property in suit has been gifted to the plaintiff-respondent subject to the life interest of her father. Evidence revealed that the father of the plaintiff-respondent was present in court at the trial stage and it appears that the plaintiff-respondent has filed this case not only to safeguard her rights but also to safeguard the life interest of her father and not to refuse, reject or deny the plaintiff-respondent's father's rights but to uphold such rights. In the circumstances I would hold that failure to make the life interest holder a party does not vitiate the proceedings in the instant case.

In any event, section 17 of the Civil Procedure Code reads as follows:

"No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every

action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

In *Cader* v *Marikkar*(4) Per Lord Roche at page 262:

"But it is provided by section 17 of the Civil Procedure Code of Ceylon (Ordinance No. 2 of 1889) that no action shall be defeated by reason of the misjoinder or nonjoinder of parties, and that the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Section 22 of the same Code provides that ail objections for want of parties shall be taken at the earliest possible opportunity and in all cases before the hearing. It was said with truth on behalf of the respondents that the objections now under consideration, unlike the objection which led to the joinder of the defendants who are respondents to this appeal, were not so taken.

Their Lordships do not doubt that in a proper case a defect of necessary parties may be dealt with by the court at any stage but in their view the present is not such a case. On the contrary the language of Lord Macnagthen in the case of *Wiliam Brandit's Sons & Co.* v *Dunlop Rubber Co.Ltd.*,(5) is applicable to the present case. The material passage from the judgment is as follows:-

"Strictly speaking Kramrisch & Co. or their trustee in bankruptcy, should have been brought before the Court. But no action is now dismissed for want of parties and the trustee in bankruptcy had really no interest in the matter."

The counsel also submitted that the amicable partition of the land and execution of the partition deed by the plaintiff-respondent's father and other members of her father's family had left a serious lacuna in the plaintiff-respondent's case, that witnesses asserted that one person was hospitalized and only eight of the co-owners signed the deed whereas the official witness like the Notary Public boldly states that all were present at the same time. This assertion by witnesses appears to be incorrect for on an examination of the said deed marked P3, it is

apparent that all 9 co-owners have signed the deed. Even the witnesses called by the defendants-appellants admitted as having signed the said deed.

It is also submitted by the counsel for the defendants-appellants that documentary and oral evidence in the instant case clearly contradicts the intention that there had been an amicable division of the larger land and contradictory evidence had been unreservedly admitted by the trial court to the detriment of the defendants-appellants and the so called partition deed remains unregistered.

In *Thiyagarasa* v *Arunodayam* (6) G.P. S. de Silva, J. as he then was held that the essential elements of due execution of deed as set out in section 2 of the Prevention of Frauds Ordinance are:

a) The deed must be signed by the party making it.
b) It must be signed in the presence of a Licensed Notary Public and two or more witnesses.
c) The Notary Public and the witnesses must be present at the same time.
d) The execution of the deed must be duly attested by the Notary and the witnesses. The Notary is as much an attesting witness as the two witnesses themselves.

The fact that parties had not entered into possession even after the deed of partition and the fact that some had restored to court action and another who was dissatisfied had protested subsequently does not make the deed of partition invalid if essential elements of due execution of the deed as set out in section 02 of the Prevention of Frauds Ordinance are complied with. In the instant case evidence reveal that the above requisites have been complied with and the fact that parties have not entered into possession of their respective lots or that some have resorted to court action and that one of them had protested as he was dissatisfied does not make the deed marked P3 invalid nor does it matter that the deed was unregistered for the present action is not between the co-owners who signed the partition deed but against a third party the defendants-appellants.

In the case of *Appuhamy* v *Premalal and Eight others*(7) the head note reads:

"The plaintiff-appellant filed action to partition a land which he claimed was at one time a portion of a larger land which was co-owned by two persons who entered into an amicable division of that larger land each taking two divided portions one of which was the land to be partitioned.

The 4th defendant-respondent denied that there was such an amicable division of the larger land and averred that the corpus in this case was an undivided portion of the larger land and prayed for a dismissal of the action:

It was held:

(1) An amicable division to be recognized by law must be a division that puts an end to co-ownership of property.

(2) An amicable division can be given effect to—

(a) By a deed of portion and a partition plan where all the co-owners sign agreeing to the division or by a cross conveyance executed by each of the co-owners whereby the notarial deeds would be the best evidence of the termination of the common ownership, or

(b) By proving that each of the co-owners entered into separate possession of the divided portions allotted to each and that the co-owners possessed their respective divided portions for a period of at least ten years undisturbed and uninterrupted so that the common ownership would in law come to and end.

(3) The documentary and oral evidence in this case clearly contradicts the contention that there had been an amicable division of the larger land."

Per Moonemalle, J. at page 303:

"An amicable division to be recognized by law must be a division that puts an end to co-ownership of property. An amicable division can be given effect to by a deed of partition and a partition plan where all the co-owners sign agreeing to the division or by cross conveyances executed by each of the co-owners, whereby the notarial deeds would

be in the best evidence of the termination of the common ownership. In the present case, the plaintiff-appellant does not rely on a partition deed or cross conveyances to establish the amicable division."

In the instant case amicable division has been given effect to by deed of partition No. 42 marked P3 with reference to a partition plan No. 371 marked P4. The said deed as well as the evidence reveal that all the co-owners having agreed to the partitioning of the property among themselves have expressed their agreement in signing the said deed marked P3. Even the witnesses called by the defendants-appellants have admitted giving the consent and signing the said deed. As stated earlier in executing the said deed essential elements of the due execution of the said deed as set out in section 02 of the Prevention of Frauds Ordinance having been complied with, the learned District Judge has come to a correct finding that the 9 co-owners have amicably partitioned the property. The fact that the said partition deed remains unregistered has no bearing to the instant case as the action is not between co-owners but with an outsider the defendants-appellant who is not a co-owner. The learned District Jugde's observation on this point is as follows:

'පැ3' දරණ නඩුවේ බෙදුම් ඔප්පුවක් බව පැහැදිලිය. පැමිණිල්ලේ නඩුවේදී ඉදිරිපත් වී ඇති සාක්ෂිවලින් ද කියා ඇත්තේ එයමය. එමෙන්ම පැමිණිල්ලේ ප්‍රධාන සාක්ෂිකරු වූ කොටිගලගේ නෝබට් පෙරේරා සාක්ෂියෙන් ද, පෙනී යන්නේ 'පැය 3' මඟින් ඊට අදල පාර්ශවකරුවන් 09 දෙනා 'පැ4' දරණ පිඹුරේ කැබලි අංක 09 අන්‍යොන්‍ය එකභත්වය උඩ 'පැ3' හි සඳහන් ආකාරයට එම පාර්ශවකරුවන්ට හවුල් අයිතිකරුවන් අතරේ බුක්ති විඳිමින් සිට ඇති එකී මහවත්ත නැමැති ඉඩම ඔවුන් අතරේ බෙදා වෙන් කර ගැනීමට ඔවුන්ගේ වේතනාව හා එකභත්වය තිබී ඇති බවයි. 2 වන විත්තිකරුගේ සාක්ෂියේ දී තමා මේ තත්වය සනාථ කරමින් 'පැය 3' ලියන අවස්ථාවේ දී එපරිද්දෙන් ම වේතනාව හා එකභත්වය තිබුන බව හඬ කොට ඇත. එමෙන් ම පැ3 පරිදි එවැනි හවුල් ඉඩමක් 'පැ3' සඳහන් පාර්ශවකරුවන් අතරේ එපරිද්දෙන් බෙදා බෙන් කර ගැනීමට එකභත්වය හා වේතනාව සෑම පාර්ශවයකයම තිබී ඇති බවට පිළිගත යුතුය. අනෙක් අතට මෙය ලියා පදිංචි වී නැති බව පැමිණිල්ලේ නා විත්තියෙන් යන දෙකෙන් ම පිළිගෙන ඇති අතරම පැමිණිල්ලෙන් කැඳවූ අදාල නොතාරිස් වන වරුසවිතාන මහතා එය ලියා පදිංචියට යැවූ නමුදු, ලියා පදිංචි නොවී ආපසු පැමිණීමට දී ඇති හේතුව සාධාරණ හේතුවක් බව පෙනී යයි.

In view of the above reasons, I would hold that the learned District Judge has come to a correct finding and see no basis to interfere with the judgment of the learned District Judge. Accordingly the appeal will stands dismissed with costs fixed at Rs. 5000/-. 480

DISSANAYAKE, J. - I agree

Appeal dismissed.