

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

C.A. Appeal
No. 664/1998 (F)
D.C. Kalutara
Case No. 5623/P

P. Lilina de Silva,
Kande Vihara Road,
Kaluamodera, Aluthgama.
Substituted Plaintiff-Appellant

vs.

1. Rev. Batuwanhene Sri
Buddharakhitha Nayaka Thero,
Kande Viharaya,
Aluthgama.
- 2A. Ranjith de Zoysa Amarasekara,
Gammedda Road,
Kaluamodera,
Aluthgama.
3. M. Quintus Perera Seneviratne,
Kandevihara Road, Aluthgama
and 9 others.

Defendant-Respondents

Before: A.W.A Salam, J

Counsel : H. Withanachchi for the Substituted Plaintiff-Appellant, Rohan Sahabandu with Athula Perera for the 1st Defendant-Respondent and Ranjan Suwandaratne with Anil Rajakaruna for the 3rd Defendant-Respondent.

Argued on : 28.11.2011

Written submissions filed on: 28.05.2012

Decided on : 08.11.2012.

A W A Salam, J

This appeal arises from the judgement and interlocutory decree entered in a partition action. The plaintiff-appellant filed action to partition the subject matter of the action depicted in plan No 855 dated 19 may 1990 made by Siri Boparachchi, Licensed Surveyor.

There was no contest among the parties as to the identity of the corpus. As a matter of fact, it was admitted by all the parties (as per the proceedings dated 3rd October 1996) that lots 1 and 2 depicted in the preliminary plan consisted of the corpus. The plaintiff's position was that the subject matter of the action had been originally owned by three people in the proportion of 1/3rd each and it devolved on the parties as set out in the amended plaint. The contesting defendant also admitted that the subject matter which he claimed was a portion of a larger land was owned by the said three people at one point of time.

The learned district judge accordingly held inter alia that the said three people were the co-owners of the land sought to be partitioned. It is to be noted that the 3rd defendant maintained that the subject matter represented only 1/3rd share of one co-owner namely Ordiris Soysa Amarasekara. Quite interestingly the learned district judge has accepted that there had been three original co-owners of the subject

matter of the action. The said finding of the trial judge reads as follows...

මෙම නඩුවේ සමස්තයක් වශයෙන් පාර්ශ්වයන් විසින් ඉදිරිපත්කල සියලු සාක්ෂි සලකා බැලීමෙන් පසු පැමිණිලිකරු පවසා සිටින පරිදි මෙම මන බෙදා වෙන්කිරීමට ඉල්ලා සිටින විෂය වස්තුව සම්බන්ධයෙන් මුල් අයිතිකරුවන් තුන් දෙනෙකු සිටියාය යන කරුණ අධිකරණයට පිළිගත හැක.

At this stage, it is pertinent to observe that the the 3rd defendant further maintained that Ordiris de Soysa Amarasekara was entitled to an undivided 1/3 share of the larger land. The learned district judge observed in the judgment that the contention of the 3rd defendant that what was shown in plan No 855 was only the 1/3 share of the land and the 1st defendant did not have any rights in the land could not be accepted. This observation of the learned district judge is found at page 235 of the brief. The said observation in its original form reads as follows.

නමුත් ඒ සම්බන්ධයෙන් 1/3 ක් අයිතිකරු වූ ඔදිරිස් සොයිසා අමරසේකරගේ අයිතිවාසිකම් හිමිවීම පිළිබඳව පැහැදිලි සාක්ෂියක් 3 වන විත්තිකරු විසින් ඉදිරිපත් කරන්නට යෙදී ඇති බැවින් ඔදිරිස් සොයිසා අමරසේකරගේ අයිතිවාසිකම් 3 වන විත්තිකරුගේ සාක්ෂියෙන් සනාථ කර සිටින පරිදි විය යුතු බව අධිකරණයේ නිගමනයයි.

As far as the corpus is concerned it was undisputed that it was in extent of 1 Acre 1 Rood and the boundaries of are as follows.

North by – Welipitiya Road
East by – Land of Kande viharaya
South by – Pepolgahaliyadda
West by – Etunnekumbura and Moonamaldigana.

On a perusal of the boundaries given in the preliminary plan it would be seen that the boundaries given in the schedule to the plaint and the preliminary plan hardly differ. The boundaries given in the preliminary plan are as follows.

North by – Welipitiya Road
East by – part of this land claimed by Rev. Buddharakkitha Thero and the land of G. Silva
South by – Pepolgaha ovita alias liyadda claimed by G.A Silva and High road
West by – Etunnekumbura claimed by M. Chandradasa , and Moonamaldigana and the land of Amarasiri.

In the light of the admission made by the parties as regards the corpus namely that the corpus consisted of lot 1 and 2 in plan No. 855, the said lot 1 and 2 should be treated as the corpus. As submitted by the Appellant the learned trial judge in his answers to the points of contest No.1 and No. 6 accepts that there were 3 original co-owners. Further the learned district judge finds that one of the co-owners Seneris Silva was entitled to a 1/3rd share and not ½ share as alleged by 11th and 12th defendants. (vide pages 233, 234 and 237 of the brief). This is quite clear from the

following finding of the trial judge found at page 235 of the brief. It reads thus..

3 වත්තිකරු වෙනුවෙන් පවසා සිටින පරිදි මෙම X යනුවෙන් පෙන්වා ඇති සැලැස්මේ ඇති ඉඩම මුල් අයිතිකරු වන ඔදිරිස් සොයිසා අමරසේකරගේ 1/3 පමණක් නිරූපනය කරන බවත් 1 වත්තිකරු ඒ සම්බන්ධයෙන් කිසිම අයිතිවාසිකමක් නොමැතියයි යන තර්කය අධිකරණයට පිළිගත නොහැක.

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As was contented by the learned counsel on behalf of the appellant the effect of the above finding amounts to a rejection of the position maintained by the 3rd defendant that the corpus was 1/3rd share of the larger land called Kawum kumbura in extent 1 ½ Acres owned exclusively by Odiris de Soysa.

A glaring mistake committed by the learned District judge in this respect appears to be that he had arrived at two inconsistent conclusions. Firstly they there were three original. Secondly one namely Odiris de Soysa had deprived the other co-owners of their rights, without proof of ouster by an overt act.

In this respect undoubtedly there is a grave error in that the learned judge has misdirected himself by not considering the question of ouster before he came to the conclusion that one co-owner had prescribed to the corpus. This finding of the learned District judge is totally contrary

to the principle laid down in *Corea vs. Iseris Appuhamy* 15 NLR 65.

The evidence of the 3rd defendant on this aspect is reproduced below for ready reference.

- ප්‍ර තමා පිලිගන්නවා පත්සලට අයිතිවාසිකම් තිබෙනවා කියා බෙදීමට යොමු වෙන්න ඉඩවේ?
- උ ඔව්
- ප්‍ර පත්සල භුක්ති විඳිනවා කියනවා කොටසක්?
- උ ඔව්
- ප්‍ර ඒ පත්සල භුක්ති විඳින කොටස මහ කැවුම් කුඹුර සහ පුංචි කැවුම් කුඹුර?
- උ ඔව්
- ප්‍ර තමා ඒ වගේම ඉඩම් දෙකෙන්ම භුක්ති විඳිනවා?
- උ නෑ, එකයි. මම මහ කැවුම් කුඹුර භුක්ති විඳිනවා.
- ප්‍ර තමා කවදාවත් පුංචි කැවුම් කුඹුර භුක්ති විඳි නැහැ?
- උ නෑ . පත්සලේ දෙකම භුක්ති විඳිනවා.....”

It is to be noted that the corpus being identified as Maha kewum kumbura, then the land to the East should be Punchi kewum kumbura which appears to be in the possession of the temple. Further, another salient point which cut across the case of the 3rd defendant is that the two children of Odiris de Soysa by deed No. 1583 and 1882 had dealt with 1/18 share which negates the position of the 3rd defendant that Odiris Soysa possessed the entire land.

In any event as the learned District judge has not analysed the evidence, regard being had to the concept of adverse

possession by ouster, I am of the view that a serious travesty of justice had occurred as a result. Hence, the judgment appealed against stands set aside. Consequently, the case is sent back for re trial. There shall be no costs.

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JUDGE OF THE COURT OF APPEAL

NR/-