

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

P. Somasiri Fernando of
Mangalathiriya,
Kalagedihena.

**1A & 5TH DEFENDANTS-
APPELLANTS**

C.A 82/1998 (F)
D.C. Gampaha 29154/P

Vs.

1. Patapilige Megel
Mangalathiriya, Kalagedihena.

PLAINTIFF-RESPONDENT

2. Karolis Jayasinghe of
310, Asgiri – Walpla, Udugampola.
3. M. Theges of
Asgiri – Walpla, Udugampola.
4. Patapilige Amarawathie of
Mangalathiriya,
Kalagedihena.

**2ND, 3RD & 4TH DEFENDANTS-
RESPONDENTS**

BEFORE: Anil Gooneratne J.

COUNSEL: P. P. Gunasena for 1A & 5th Defendant-Appellants

C. Ladduwahetti for 2nd, 3rd & 4th Defendant-Respondents

ARGUED ON: 22.02.2012

DECIDED ON: 03.05.2012

GOONERATNE J.

This is an appeal from a partition suit, where Plaintiff filed action in the Original Court to partition the land described in the schedule to the plaint among several co-owners. The original owner was one Sellenchi who died leaving behind 6 children (admission No. 2). Corpus not denied. The only matter urged in this appeal was that one of the children of the original owner Sellenchi, namely Basthiyana had acquired prescriptive rights to the entire land. To prove this position is an uphill task for the Appellant and to prove that 'Basthiyana' had prescribed as against all other co-owners (points of contest No. 4). One has to prove ouster by way of an overtact.

The law is settled on this aspect that a co-owner cannot prescribe against other co-owners unless an overtact could be established. I have considered the long line of authorities on this aspect. However the following as cited by the learned counsel for Respondent need to be accepted and followed.

1. Wickremaratne Vs. Alpenis Perera 1986 SLR 190...

Prescription among co-owners – Proof of ouster – Partition action.

In a partition action for a lot of land claimed by the plaintiff to be a divided portion of a larger land, he must adduce proof that the co-owner who originated the division and such co-owner's successors had prescribed to that divide portion by adverse possession for at least ten years from the date of ouster or something equivalent to ouster. Where such co-owner had himself executed deeds for undivided shares of the larger land after the year of the alleged dividing off it will militate against the plea of prescription. Possession of divided portions by different co-owners is in no way inconsistent with common possession.

A co-owner possession is in law the possession of other co-owners. Every co-owner is presumed to be in possession in his capacity as co-owner. A co-owner cannot put an end to his possession as co-owner by a secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result.

Registration extracts are evidence of the particulars entered in the register. The objection that the documents referred to in them should have been produced cannot be taken for the first time in appeal.

2. Maria Fernando Vs. Anthony Fernando 1997 (2) SLR 356.

Partition – Prescription possession between co-owners

Long possession, payment of rates and taxes, enjoyment of produce, filing suit without making the adverse party, a party, preparing plan and building house on land and renting it are not enough to establish prescription among co-owners in the absence of an overt act of ouster. A secret intention to prescribe may not amount to ouster.

The evidence led at the trial does not support any right of prescription and or 'ouster' which would favour the Appellant. Learned Counsel for Respondent also invited this court to an anomalous position in the Petition of Appeal more particularly the prayer of same. Appellant seeks a dismissal of the Appeal and in the alternative to acquire all share of co-owners. This would in a way amount to rejection of the Petition of Appeal which cannot be reconciled. However based on admission No.(2) 6 children inherited 1/3rd right each.

This court also notes with much interest the written submission filed by the Plaintiff-Respondent. The following submissions are incorporated in this judgment which would clearly establish Respondent's position and demolish Appellant's version.

1. Appellant admits Mathes as a child of Sellenchi. The Appellant also admits that Agi is a child of Mathes and that she lived in this property until her death. The Appellant says in his examination in chief that he is unaware as to whether the Plaintiff is a child of Agi. (at page 77). The birth certificate marked P5 at page

197, clearly proves that the Plaintiff is a child of Agi. In this regard it is respectfully submitted that the averments referred to earlier in the Petition of Appeal clearly shows (paragraph 4) that the Appellant cannot deny that the Plaintiff is a child of Agi.

2. In his cross-examination at page 90, the Appellant clearly admits that the Plaintiff is in possession of the land. The Appellant says that Plaintiff has possessed the land by force for 20 years.
3. In cross-examination, (at page 80) the Appellant begins with an admission of the six brothers and sisters of Basthiyana (the Appellant's mother). It was also admitted that some of them possess this land. The Appellant did also admit that there were two houses in the land and that the Plaintiff lived in that house with his mother. (at pages 81 and 82).
4. Cross examination of A. Simon (at page 112) who was called by Appellant and has admitted to be the brother- in-law of the Appellant. This witness claims that he knows the land since 1945 and that the plaintiff, Migel has been living in this land since 1945. In this regard it may be submitted that if the Plaintiff is not a co-owner, there is clear evidence to prove prescription. The Plaintiff's position is that he is a co-owner by virtue of the fact that he is the son of Agi and that he is not in a position of defraud the other co-owners in collusion with the Appellant.

In all the above circumstances I see no basis to interfere with the judgment of the learned District Judge. The trial Judge seems to have rejected the version of the Appellant and also disbelieved the evidence of the Appellant. There is also reference to another judgment marked P3 (D.C 24371/L) pertaining to the same corpus, filed by the Appellant against the Plaintiff, in this case. Even in that, Defendant-Appellant had given false evidence.

As such I affirm the judgment of the learned District Judge.
There is no merit in this appeal. This appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL