

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

C.A 1304/1998 (F)  
D.C. Horana 5093/P

Janguge Sirineris Silva of  
Olaboduwa,  
Gonapola Junction.  
**(Deceased)**

**PLAINTIFF**

Jambuge Methsiri of  
Olabodua,  
Gonapola Junction.

**SUBSTITUTED-PLAINTIFF-  
APPELLANT**

Vs.

1. Rev. Kahatapitiye Pannasena  
formerly of Sri Sudharmaramaya,  
Ahungalla.  
**(Deceased)**
- 1A. Jambuge Dasintha Shashi Jayakody  
of Olaboduwa,  
Gonapola Junction.
2. Gangodawilage Maithreeratne of  
Olabodua,  
Gonapola Junction.
3. Gangodawilage Mango Nona  
formally of Olaboduwa,  
Gonapola Junction.  
**(Deceased)**
- 3A. Ponnampemurage Dayawathie of  
Olaboduwa, Gonapola Junction.
4. Gangodawilage Subaneri Singho,  
formerly of Olaboduwa, Gonapola  
Junction.  
**(Deceased)**
- 4A. Gangodawilage Don Ranjith  
Hemachandra of No. 110,  
Kothalawala, Kaduwela.

5. Gangodawilage Balasena  
formerly of Olaboduwa,  
Gonapola Junction.  
**(Deceased)**
- 5A. Gallage Dayawathie of  
Olaboduwa,  
Gonapola Junction.

**DEFENDANT-RESPONDENTS**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** A. J. Udawatta with Harendra K. Perera  
for the Substituted Plaintiff-Appellant

R Guneratne with K.R. Jayalath  
for the 5<sup>th</sup> Defendant-Respondent in CA 1304/1998

**ARGUED ON:** 01.06.2012

**DECIDED ON;** 26.09.2012

**GOONERATNE J.**

This was a partition suit and the position in this case, according to the Plaintiff was that since common possession was inconvenient Plaintiff moved court to partition the land as per the pedigree and shares disclosed in the plaint (paragraph 7 of plaint). The land in dispute is described in the schedule to the plaint and depicted as lot 9 in plan No. 524 of 23.2.1994. 1<sup>st</sup>

to 4<sup>th</sup> Defendants claim to be co-owners and the 5<sup>th</sup> Defendant was added as a party who claim the entire corpus. 5<sup>th</sup> Defendant-Respondent's position was that his father was in long possession of the corpus along with 2 other adjacent lots and possessed these lands as one property. The question is whether the land in dispute could be partitioned as prayed for by the Plaintiff-Appellant or whether the corpus in its entirety belongs to the 5<sup>th</sup> Defendant-Appellant based on prescriptive rights. Parties proceeded to trial on 13 points of contest. This appeal is from the dismissal of Plaintiff's action.

Plaintiff-Appellant urge that 5<sup>th</sup> Defendant-Respondent has no title to the land in dispute and trace his title to a final decree in partition case 14109. 1<sup>st</sup> Defendant was one of the allottees in the said case and the 1<sup>st</sup> Defendant was known as J. Pelis Silva. The 8<sup>th</sup> Defendant in the said partition case was the present 5<sup>th</sup> Defendant's father (Hendrick). Hendrick was allotted lot 13 (Plan P1 and decree P2). Plaintiff argue that Hendrick purchased lots 10 & 11 after the said partition case and he possessed lots 9, 10 & 11 as one land. Plaintiff rely and argue that 5<sup>th</sup> Defendant in evidence has given contradictory statements to the effect that his father possessed lot (9) up to 1962 and thereafter in 1976 he constructed a wattle and daub hut within the corpus and until such time resided on lot 13. Plaintiff-Appellant

refer to the proceedings at pg. 179 of appeal brief and state 5<sup>th</sup> Defendant's father never cultivated. Appellant argue that mere possession cannot be converted to prescriptive rights in terms of Section 3 of the Prescription Ordinance.

Having perused the evidence in the case, the judgment of the original court and submissions of learned counsel for 5<sup>th</sup> Defendant-Respondent it is apparent that Plaintiff admitted the following facts more particularly in his cross-examination.

- (a) The house depicted in lot 9 in plan <sup>AW2</sup> 73<sub>^</sub> plan P2, 5<sup>th</sup> Defendant's father Hendrick occupied same. Balasena the 8<sup>th</sup> Defendant came into occupation 15/20 years ago prior to that no other person occupied.
- (b) Lots 10 & 11 possessed by Balasena (5<sup>th</sup> Defendant).
- (c) From the said time of partition case No. 14109 Hendrick (Balasena's father) occupied lots 9, 10 & 11.
- (d) Lot 9, 10 & 11 depicted as 'G' in plan 378 (5D2) claimed by 5<sup>th</sup> Defendant's father. Building in plan 5D2 share as 'G'
- (e) By referring to document 5D2 Plaintiff admitted 5<sup>th</sup> Defendant's father's rights to lot 9, it's house etc.

As observed by the learned counsel for 5<sup>th</sup> Defendant-Respondent,

Plaintiff's father was in possession of lot 9 before institution of the partition case 14109 and continued possession after decree. Final decree entered on 15.2.1939. After 5<sup>th</sup> Defendant's father Hendrick's demise the 5<sup>th</sup> Defendant continued to possess the lands in dispute more particular lot 9. The learned counsel also refer to Section 110 of the Evidence Ordinance. Section 110 reads thus:

When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

On the above basis invite court to accept the position that the burden is on Plaintiff-Appellant to prove that Balasena 5<sup>th</sup> Defendant was not in possession. Perusing the evidence I find that Plaintiff nor his witnesses were able to prove their possession. In fact the 2<sup>nd</sup> Defendant's evidence would relate from 1993 onwards. The 2<sup>nd</sup> Defendant I observe could not give relevant details of possession at all. He is clueless as to the land in dispute, its possession, plantation, improvements etc.

The trial Judge emphasis in his judgment of long years of possession by the 5<sup>th</sup> Defendant and his father from whom 5<sup>th</sup> Defendant derives rights to the property. Trial Judge also state after the decree in partition case 14109 no allottee moved for writ of possession to obtain possession and court observes that it is doubtful that Plaintiff's party ever

obtained possession of the land in dispute. Plaintiffs admit in re-examination that lots 9, 10 & 11 were possessed as one. Evidence of pabilis was that Hendrick (5<sup>th</sup> Defendant's father) felled jack trees and no person objected. I am of the view that the trial Judge's conclusions should not be disturbed. I would refer to cases where presumption of ouster drawn from long and continued possession.

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The plaintiff claimed interests in one land about A.9 R.3 P.25 in extent. Evidence disclosed that for 40 years prior to the date of action there had been divided possession of the property and several deeds executed on that basis.

Held:

Presumption of ouster could be drawn from long and continued possession for a period of well over 40 years. Plaintiff's action was correctly dismissed.

My views are also fortified by perusing the case of Fernando Vs. Wijesooriya 48 NLR 320 Canekeratne J. at pg. 325..

The whole law of prescription is to be found in Ordinance No. 22 of 1871 (Ch. 55 of C.L.E). It is not necessary to prove that the possessor had some title to the land at the time of entry; the requirement known by the Roman law as *Justus titulus* or *justa causa* need not be proved in *Ceylon-Cadija Umma v. Don Manis*. A man may come in by rightful possession, and yet hold over adversely without a title; and, if he does, such holding over, under circumstances, would be equivalent to an actual ouster – *Doe v. Prosser*.

There must be a corporeal occupation of land attended with a manifest intention to hold and continue it and when the intent plainly is to hold the land against the claim of all other persons, the possession is hostile or adverse to the rights of the true

owner. It is the intention to claim the title which makes the possession of the holder of the land adverse; if it be clear that there is no such intention there can be no pretence of an adverse possession. It is necessary to inquire in what manner the person who had been in possession during the time held it, if he held in a character incompatible with the idea that the title remained in the claimant to the property it would follow that the possession in such character was adverse. But it was otherwise if he held in a character compatible with the claimant's title – his possession may be on behalf of the claimant or may be the possession of the claimant (p. 396 of 40 NLR) or from the conduct of the party's possession an acknowledgment of a right existing in the claimant could fairly and naturally be inferred. To prevent the operation of the statute, a parol acknowledgment of the adverse possession by the person in possession must be such as to show that he intends to hold no longer under a claim of right; but declarations made merely with a view to compromise a dispute are not sufficient – Angel on Limitation p388.

In all the above facts and circumstances of this case, this court is not inclined to interfere with the judgment of the learned District Judge. As such I affirm the judgment and dismiss this appeal with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL