

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

C.A. 756/96 (F).
D.C. Bandarawela: 71/P

S.M.Sudubanda, Medaulpathegedara,
Karagahaulpotha, Medawela, Udukinda
PLAINTIFF -APPELLANT.

Vs.

1. S.M.Sudubanda (deceased)
2. S.M.Heenmenika
3. S.M.Punchimenika
4. S.M.Samarakoon
5. S.M.Jayasekera
6. S.M.Ratnayake
7. S.M.Tikiribanda
8. S.M.Hemalatha Malini
9. Mallika Samarakoon,
All of Aravegedara,
Karagahaulpotha, Medawela,
Udukinda.

DEFENDANT-RESPONDENTS

BEFORE: A W A SALAM, J

COUNSEL: Lasitha Chaminda for plaintiff-appellant and Muditha
Premachandra for the defendant-respondents.

ARGUED ON: 14.1.2011

Written-submissions tendered:23.5.2011

DECIDED ON: 28.05.2012

A.W.A. Salam, J.

The plaintiff-appellant in this judgment is referred to as the plaintiff, the deceased 1st defendant as the 1st defendant, 2nd defendant-respondent as the 2nd defendant and 3rd to 9th substituted-defendants who were substituted in the room of the deceased-1st defendant as 3rd to 9th substituted-defendants, designations they held in the district court. The factual background to this appeal in a nutshell is that the plaintiff filed a partition suit to put an end to the co-ownership of a paddy field, citing two persons as its original owners. According to the plaint on a clear chain of title and devolution of shares based on inheritance the plaintiff is entitled to an undivided 5/18, the 1st defendant 12/18 and the 2nd defendant 1/18 shares.

The 3rd to 9th substituted-defendants having indirectly admitted the original ownership attributed in the plaint, sought a dismissal of the partition action based on the

footing that Mudianselage Punchibande Welvidane, one of the predecessors in title of the 1st defendant had prescribed to the entire corpus. The learned district judge having investigated the title at the conclusion of the trial held inter alia that the aforesaid Mudianselage Punchibande Welvidane has acquired a prescriptive title to the entire paddy field and dismissed the partition action. This appeal has been preferred by the plaintiff against the said judgment.

According to the evidence led at the trial Ukkumenika and Punchimenika originally owned the paddy field in the proportion of 1/2 share each. Ukkumenika by deed No 5130 dated 6 July 1904 attested by DF Gunasekara, Notary Public transferred her undivided 1/2 share to Kiribanda, Siribaddena and Siyathu making each one of them entitled to an undivided 1/6 share of the corpus. The aforesaid Siribaddena died intestate leaving as his heirs Dingiri Menika, Ran Menika and Heen Menika who became entitled to an undivided 1/18 share each. Ran

Menika died leaving as her sole heir Bandara Menika. Siyathu (the owner of undivided 1/6 share), Ran Menika (the owner of an undivided 1/18 share) and Bandara Menika (the owner of an undivided 1/18 share) transferred an undivided $1/6+1/18+1/18$ shares in favour of the plaintiff by deed No 2217 dated 5 June 1974 attested by A W A J Silva, Notary Public who thus became entitled to an undivided 5/18 share. Heen Menika one of the daughters of Siribaddena remained the owner of the undivided 1/18 share on the date of institution of the partition suit and therefore is entitled to that share. The undivided 1/2 share originally owned by Punchimenika had devolved Kiribanda who had transferred the same to the 1st defendant. The devolution of title and the manner in which almost all the transfer deeds have been worded are clear indications of the corpus having been owned in common by the parties.

It has been laid down in the case of Corea Vs Iseris Appuhamy (15 NLR 65) that the possession of one

co-owner enures to the benefit of the other co-owners and that a co-owner's possession in law is the possession of his co-owners.

It is important to remember that by secret intention no co-owner is able to prescribe against the other co-owners unless nothing short of ouster or something equivalent to ouster could be proved. In this matter undoubtedly, Punchibanda has entered the subject matter as a co-owner and therefore by merely forming a secret intention as has done, by mortgaging the entire land cannot commence adverse possession. Even in the instrument of mortgage 3D2 and 3D3 Punchibanda has stated that he had acquired title to the property mortgaged by deed No.5359 and by paternal inheritance. The two mortgage bonds in question not being usufructuary mortgages could not have made any changes with regard to the possession of the subject matter. Above all, as the co-owners are closely related and the land sought to be partitioned being a paddy field

the type of possession established on behalf of the 1st defendant does not establish ouster by an overt act or adverse possession against the other co-owners.

In the circumstances, the finding of the learned district judge that the 1st defendant had prescribed to the corpus is contrary to law and also evidence adduced at the trial. Hence, the finding that the 1st defendant had prescribed to the corpus is set aside and the case is remitted back for reinvestigation of title. Appeal allowed subject to the above alteration.

There shall be no costs.

Judge of the Court of Appeal

Kwk/-