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

A. L. Ibrahim alias Samsudeen of
Pahamune Post, Paragahakotuwa.
(Deceased)

PLAINTIFF-APPELLANT

1a. Ibrahim Sihana of
Pahamune Post, Paragahakotuwa.

1b. J. Monnowwara of
Pahamune Post, Paragahakotuwa..

1A & 1B SUBSTITUTED PLAINTIFF-APPELLANTS

C.A 655/1998 (F)
D. C. Kuliyapitiya 3957/P

Vs.

1. Thambi Lebbelage Samsudeen of
Siyambalagaskotuwa.
(Deceased)

1a. Thambi Lebbelage Samsudeen Mohamed
Lebbe of Siyambalagaskotuwa.

2. Asana Lebbelage Nabeesa Umma of
Pahamune Post, Paragahakotuwa.
(Deceased)

2a Nauru Lebbelage Faaruk of
Pahamune Post, Paragahakotuwa.

2b Nauru Lebbelage Raasim of
Pahamune Post, Paragahakotuwa.

3. Asana Lebbelage Marsoof of
Pahamune Post, Paragahakotuwa.
(Deceased)

3a. Marsoof Adam Pulle of
Pahamune Post, Paragahakotuwa.

3b. Mohamaddu Shariff of
Pahamune Post, Paragahakotuwa.

4. Asana Lebbelage Saman of

Malwana Post, Rassapana.
(Deceased)

4a. Abdul Samad Umma Larifa of
Malwana Post, Rassapana.
4b. Abdul Samaad Rizana of
Malwana Post, Rassapanna
5. Asana Lebbelage Hawwa Umma of
Pahamune Post, Paragahakotuwa.
And 7 others

DEFENDNATS-RESPONDNETS

BEFORE: Anil Gooneratne J.

COUNSEL: Dr. Sunil Cooray for the Substituted Plaintiff-Appellants

Nimal Weerakkody for the Defendant-Respondnets

ARGUED ON: 14.06.2012

DECIDED ON; 09.10.2012

GOONERATNE J.

This was a partition suit to partition a land called 'Galkandahena' described in the schedule to the plaint. The said land is depicted as lots 1, 2 & 3 in licensed Surveyors plan No. 1558 marked 'X', and his report is produced marked 'Y'. The extent of the said lots 1 – 3 is

about 2A; 1R' 35P. The dispute in this case pertains to lot 3 of the said plan and the Defendant-Respondent urge that it is a different land called 'Kongahamulawatte' and 'Kapuhena'. It was the position of the Defendant-Respondent that lot 3 should be excluded from the corpus and that the Defendants have prescribed to the said lot 3. The trial Judge held in favour of the 1st & 8th to 12th Defendant-Respondents on the basis that they have prescribed to the above lot 3 and answered points of contest No. 1, that the corpus be confined to only to the said lots 1 & 2. This appeal is from the said judgment more particularly confined to the above.

The only point to be considered in this appeal is whether 1st & 8th to 12th Defendant-Respondent has prescribed to lot 3 of the plan marked 'X' as held by the learned District Judge (by points of contest No. 1, trial judge held in favour of the Defendant-Respondent and excluded lot 3 from the corpus and allowed the partition confined to lots 1 & 2). 1st & 8th Defendants now deceased were brothers. The 1st & 8th Defendant jointly with 9th , 10th , 11th & 12th Defendants contested the action against the Plaintiffs. The learned trial judge in his judgment held that lot 3 is part of the corpus sought to be partitioned and is part of 'Galkandahena'. The above Defendant-Respondentsmaintained that lot 3 is part of 'Kongahamulawatte' and 'Kapuhena'. The trial Judge having considered the deeds submitted by

the Defendant-Respondents marked 1V4 to 1V6 and comparing and considering the evidence regarding the boundaries described in the said deeds with the boundaries contained in plan 'X' has arrived at a conclusion that south, western & eastern boundaries do not tally. Trial judge has also gone into the extent of lot 3 which is 1Acre; 3Rood; and 26 Perches and the extends given in deed 1V4 to 1V6 do not tally with lot 3. On the above basis trial judge holds that lot 3 is part of the land sought to be partitioned.

The argument of the Plaintiff-Appellant is that on first principles of law that possession of one co-owner is possession by all co-owners and that among co-owners adverse possession will commence only by an ouster of other co-owners by an overt act showing that the prescribing co-owners or owner is holding adversely to other co-owners. If that be so is there evidence of 'ouster'? Vide Tillekeatne v. Bastian 1918 21 NLR 12; Corea v. Iseris Appuhamy 15 NLR 65; Nonis v. Peththa 73 NLR 1. It was the contention of the Appellant that there is no material or evidence of ouster. Appellant further submits that 1st Defendant is a co-owner with others (Plaintiff and 1st to 4th Defendants who were given shares by the judgment. No ouster has been proved. Lots 3 & 2 are separated by a fence less than 10 years old before action was filed (as in Surveyor's report 'y').

I note that the trial judge has carefully analysed in the judgment with the evidence led at the trial. There is no purpose in faulting his views which are supported by evidence. However for purposes of clarity I would refer to certain items of evidence.

(a) Evidence of 1A Defendant was that his father the 1st Defendant had put up the building 'C' & 'G' over 50 years ago and that his father possessed lot 3 and took all the produce from the plantation within lot 3. After 1st Defendant's death, 1A Defendant testify that his brother the 12th Defendant possessed and the evidence support the position that 1st, 8th to 12th Defendants were in possession of lot 3 and had plucked coconuts from all the trees within lot B.

(b) The above evidence corroborated by 9th Defendant and 10th Defendants. The 10th Defendant further states that building 'C' is 80/90 years old and constructed and occupied by 1st Defendant. 9th & 10th Defendant testified that the Plaintiffs, 2 – 4 Defendants never possessed lot 3.

(c) Plaintiff has never claimed lot 3 or the plantation before the Surveyor

(d) Report 'Y' only suggest that lot 1 was possessed by Plaintiff and no mention that plaintiff possessed and took the produce from lot 3.

(e) In fact all the Defendant-Respondents reject Plaintiff's possession from lot (3) and specifically denied Plaintiff's enjoyment of any produce from lot (3).

(f) Plaintiff in evidence attempted to testify and state that the Defendant forcefully entered lot (3) in 1969. this aspect of force not corroborated by other independent evidence like police complaint etc.

The types of ouster or which acts constitute ouster are considered by C. Ananda Grero in his text of selected legal essays. Pg. 9.

In the case of Rajapakse Vs. Hendrick Singho 61 NLR 32.. there was overwhelming evidence that the defendants, since the year 1922 were not only in occupation of the land but also took its produce to the exclusion of the plaintiffs and their predecessors in title and gave them no share of the produce, paid them no share of the profit nor any rent, and

did not act from which an acknowledgement of a right existing in them would fairly and naturally be inferred. It was held in this case that the evidence disclosed an ouster of the plaintiffs by the defendants and that the ouster continued for a period of over ten years.

In this case the acts like the occupation of the land by the defendants since 1922, taking the produce to the exclusion of the plaintiffs, non-payment of the share of profits to the plaintiffs and the act of no giving any share of the produce to the plaintiffs were considered as "ouster".

I find that there is overwhelming evidence that Defendant-Respondents possessed lot 3 of the plan 'X' for a very long period of time and also that they enjoyed the plantation and took the produce as coconuts for themselves exclusively. Defendant-Respondent never gave the plaintiff party a share of the produce or profits. As such evidence 'ouster' had been established.

I have also given my mind to several items of evidence and I would prefer to include the following items of evidence of the 10th Defendant at folio 189 of the original record which support the question of long years of prescriptive possession and enjoyment of the produce to the exclusion of the Plaintiff party.

අංක 3 දරණ බිම් කැබැල්ලෙන් කෝන්ගහමුල වත්තෙන් පැමිණිලිකරුට කිසිම අයිතියක් නැහැ. ගල්කන්දේ හේනේ මට අයිතියක් නැහැ.

අංක 3 දරණ බිම් කැබැල්ලෙන් 'සි' කරණ ගොඩනැගිල්ල අවුරුදු 80 ක් 90 ක් පැරණියි. මාගේ පියා මෙහි පදිංචි වෙලා සිටියා. මමත් පදිංචි වෙලා

සිටියා. මම උපන්නෙත් ඒ ගෙදරමයි. මගේ වයස දැන් අවුරුදු 55 යි. දැන් අවුරුදු 55 කට පෙරත් මගේ පියා මා සමග මේ ඉඩමේ පදිංචි වෙලා සිටියා. පියාට මේ නඩුව දාලා තිබන ඉඩමෙන් අයිතියක් නැහැ.

අංක 3 කැබැල්ලේ පොල් තිබෙනවා. පොල් කඩා ගත්තතේ මාග් පියා සහ මිය ගිය 1 වෙනි විත්තිකාර සමිසුදින්. අංක 3 දරණ බිම් කැබැල්ල ගල්කන්දේ හේනේ කොටසක් නොවේ කියලා මම කියනවා. අංක 3 කැබැල්ල කෝන්ගහමුල හේන කියලා මම කියනවා. ඒ ඉඩමට අයිතියක් සහ බුක්තියක් තිබෙනවා. අවුරුදු 40 ක 50 ක සිට පොල් කඩාගෙන බුක්ති විඳගෙන එනවා. කොන්ගහමුල වත්ත අයිති 1 වෙනි විත්තිකාර සමිසුදින්ට සහ 8, 9, 10, 11, 12 විත්තිකරුවන්ට. අංක 3 දරණ බිම් කැබැල්ල ඒ අය සහ ඒ අයගේ පුර්ව අයිතිකරුවන් 1900 සිට බුක්ති විදගෙන ඇවත් තිබෙනවා. පැමිණිලිකරුට අංක 3 කැබැල්ලේ කිසිම බුක්තියක් හෝ අයිතියක් නැහැ. ඔහු අංක 3 න් කොටසකි වත් බුක්ති වින්දේ නැහැ.

In Simon Perera Vs. Jayatunge 71 NLR339 pg. 11.. that there was sufficient evidence of ouster and that B had acquired as against the other co-owners, prescriptive title from the time of ouster in respect of the lot which she possessed exclusively in pursuance of the amicable division. In this case Thambiah J. said that "the question whether a co-owner has acquired prescriptive title to a divided lot as against the other co-owners is one of fact and has to be determined by the circumstances of each case.

A co-owner is a mala fide possessor with reference to possession and improvement. He would be entitled to the rights of a bona fide possessor in respect of

improvement if he effected the improvements with the consent and acquiescence of the rest of the co-owners.

Even if I look at the case of Tillekeratne Vs. Bastian 21 NLR 12...

It is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse.

"it is a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether tit is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought."

Alwis Vs. Perera 21 NLR 321..

Where a person transferred his lands to certain family connection, but continued in possession till date of action (sixty years), the Supreme Court held (in the circumstances) that the possession was not permissive, but that it should be presumed to have become adverse.

Tillekeratne v. Bastin followed.

Semble, even apart form this presumption, a vendor, who after sale remains in possession, should be considered as possessing adversely tot eh purchaser.

It is observed that facts and circumstance would differ from case to case. Rules pertaining to 'ouster' cannot be so harsh but in a case of involving co-owners when there is evidence of so many persons who live within a particular area of land and enjoyed the produce within that area for

so many years exclusively amongst themselves without it being shared or taken over by another, I think 'ouster' cannot be ruled out. In the instant case there is overwhelming evidence of possession for long years by the Respondent party and their predecessors confined to lot 3 of plan "X". As such in these circumstances I do not wish to disturb the findings of the learned District Judge who has analysed the evidence carefully. Therefore I affirm the judgment of the District Court and dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL