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

C.A.No.761/99(F)

D.C.Kegalle No.24981/P

Kankanamlage Nandadasa
5, Bangalawatte
Dewalagama.

Plaintiff-Appellant

Vs.

Kodagoda Hitige Jinadasa(Deceased)
1A H.J.E.de Alwis (Deceased)
Kehelwathugoda,
Dewalegama.
1B Kodagoda Hitige
Romanis Thanuja
Kodagoda,
Kehelwathugoda,
Dewalegama.

2nd Substituted-

Defendant-Respondent

Before : A.W.A.Salam, J.

Counsel : D.M.G.Dissanayake with Balasuriya for the Plaintiff-Appellant. Lala Matarage with Tharaka Jayathilaka for the 1B- substituted-Defendant-Respondent.

Argued on : 11.06.2012.

Decided on : 15.6.2012.

A.W.A. Salam,J.

This appeal arises on the judgment dated 18.08.1999 of the learned Additional District Judge of Kagalle, dismissing the partition action filed by the plaintiff in respect of the land depicted as lot 2 in the preliminary plan No.795 made by I.G.R.Perera, Lisensed Surveyor and Commissioner. According to the amended plaint, the plaintiff on a chain of title set out in the plaint is entitled to an undivided 1/3rd share and the defendant to an undivided 2/3rd share. According to the plaintiff at a certain point of time by right of purchase one K.M. Podi Appuhamy, K.A.Andiris and the defendants were entitled to an

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undivided 1/3rd share each of the corpus. The undivided rights of Podiappuhamy has been transferred to the defendant on deed No.5712 dated 24th December 1985, thus making the defendant the owner of an undivided 1/3rd share of the corpus. K.A. Andiris being a co-owner of the property along with the defendant has transferred his share on deed No. 6017 dated 24th May 1988 to the Plaintiff and thereby the plaintiff became the co-owner of an undivided 1/3rd share of the corpus.

The defendant in his statement of claim maintained that he had been in undisturbed and uninterrupted possession of the subject matter adverse to the right of the plaintiff and his predecessor in title acquired a prescriptive title. The Defendant has fixed the period of commencement of prescriptive possession from the year 1976. The learned District Judge after trial came to the conclusion that the defendant is vested with paper title to 2/3 share of the land and prescriptive title to the balance 1/3 share. He further held that the defendant has therefore prescribed to the entire property and dismissed the partition action.

It is common ground that by deed No.678 in the year 1976, the aforesaid Podi Appuhamy, Andiris Appuhamy and the defendant became the owners of the property in dispute by deed No.5712 dated 24th December 1985. Thereafter, the defendant by right of purchase had obtained paper title to an undivided 2/3rd share of the entire corpus. The only dispute was whether the plaintiff is the owner of the balance 1/3rd share or the defendant had prescribed to the entire land including the undivided 1/3rd share held by Andirias.

As far as the paper title is concerned Andiris has transferred his undivided 1/3rd share to the plaintiff almost 2 years and 5 months after the defendant has purchased rights on deed No.5712 from Podi appuhamy. The partition action has been instituted in September 1988 and the defendant has purchased undivided rights from his brother Podiappuhamy in December 1985. Based on these facts, it is hardly possible for the defendant to have prescribed to the entire land from the date of deed No.5712. Learned Addl. District Judge has apparently failed to consider the fact that the defendant had purchased undivided rights on deed No.5712 and whether in those circumstances he could claim prescription to the entire land. As a matter of law the learned Addl. District Judge has failed to consider

that every co-owner must be presumed to possess the corpus on behalf of the other co-owners and that it is not possible for a co-owner to put an end to the co-ownership and commence prescriptive possession by secret intention in his own mind. It is emphasised in Corea Vs. Iseris Appuhamy (15 NLR 65) that cogent evidence is necessary regarding proof of ouster or something equal to an ouster.

In the case of Gunawardena Vs. Samarakoon (58 N.L.R.401) It was held that the possession of a co-owner cannot be ended by a secret intention in his mind. The possession of one co-owner does not become possession by title adverse to others until ouster or something equivalent to ouster takes place.

The learned counsel for the defendant has submitted that the primary questions of fact decided by the learned District Judge should not be disturbed and court in fact should be reluctant in the absence of compelling reasons to disturb the findings of the trial Judge. In support of this principle the learned counsel has cited the Judgment in Robo Singho Vs. Jayawardena 72 N.L.R.193 where the judgment was given in favour of the plaintiff on prescriptive title by court which was later affirmed by the Supreme Court and in appeal before

the Privy Council Lord Willberbost stated that in the absence of an error in law, the findings of both courts should not be disturbed. The Judgment thus cited is not be applicable to a case where the District Judge has seriously misdirected himself with regard to the question of law. In this matter the learned District Judge has not considered the facts in the light of the principle enunciated in the cases of Andiris Appuhamy (Supra) and also the question with regard to proof of title by prescription among co-owners. In the circumstance, the learned District Judge has seriously erred with regard to the application of law to the given facts and I am not inclined to affirm the judgment as it has resulted in a serious miscarriage of Justice. For the reasons stated the impugned judgment is set aside and the case sent back for re-trial. There shall be no costs.

JUDGE OF THE COURT OF APPEAL

WC/-