

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

Prathapage Nonachchi of
Karametiya, Kirama.

PLAINTIFF

C.A. 175/1997(F)
D.C. Walasmulla 179/P

Vs.

1. Marappulige Somapala of
Koongahatenna, Kirama.
(Deceased)

2. Prathapage Babundiris of
Karametiya, Kirama.
(Deceased)

Minor	1A.	Maddumage Somawathie
	1B.	Marappulige Wickremasinghe
"	1C.	Marappulige Swarnalatha Jayalath
"	1D.	Marappulige Dewa Parakrama
"	1E.	Marappulige Asura Dewa, All of Watukanda Karametiya, Kirama.

1B to 1E minor defendants by their G. A. L.
1A defendant.

2A. Pallage Podinona, (L. R. of the deceased 2nd
Defendant) Wattehena, Karametiya, Kirama.

DEFENDANTS

And

Pallage Podinona of
Wattehena, Karametiya,
Kirama.

**2A DEFENDANT-APPELLANT-
PETITIONER**

Vs.

Prathapage Nonachchi of
Karametiya, Kirama.

PLAINTIFF-RESPONDENT

- 1A. Maddumage Somawathie
- 1B. Marappulige Wickremasinghe
- 1C. Marappulige Swarnalatha Jayalath
- 1D. Marappulige Dewa Parakrama
- 1E. Marappulige Asura Dewa,
- 1E. Marappulige Amaradewa – 1B to 1F minors

Represented by their G. A. L. the 1A
Defendant.

DEFENDANT-RESPONDENTS

BEFORE : Anil Gooneratne J.

COUNSEL : 2A Defendant-Appellant absent and unrepresented
Lal C. Kumarasinghe for 1A Defendant-Respondent
J. Jayawickrema for Plaintiff-Respondent

ARGUED ON : 01.09.2011

DECIDED ON : 04.10.2011

GOONERATNE, J

This was an action filed in the District Court of Walasmulla (originally D. C. Tangalle) to partition a land called 'Maragahawatte' as shown in plan No. 370 of 2.9.1985 and more particular lot 'A' of same in extent of 1 Acre 2 Roods & 27 perches. (plan annexed x to plaint). At the hearing before this court the Plaintiff-Respondent and 1A Defendant was represented. 2A Defendant-Appellant was absent and unrepresented and was never present in this court or represented by counsel at any stage of this of this appeal. As such this court is entitled to assume that she has failed to exercise due diligence to prosecute this appeal and on that ground alone the appeal should be rejected. Nevertheless learned counsel for Plaintiff-Respondent and 1A Defendant-Respondent made submissions before me supporting the learned District Judge's very comprehensive judgment.

On the pedigree as pleaded, one Sadiris owned the land in question and he had by deed P1 (No. 11057) transferred the land to Pavissina and Suwandiris. Perusal of P1 the District Judge state undivided $\frac{1}{2}$ share had been transferred to both of them equally. As such both would be entitled to undivided $\frac{1}{2}$ share. Plaintiff's father Pavissina sold by deed P2 his share to

Dingira who had by deed P3 sold the share to Plaintiff. As such plaintiff would be entitled to undivided $\frac{1}{2}$ share of the corpus. The other co-owner Suwandiris had by deed 1D1 (No. 2410) sold his undivided $\frac{1}{2}$ share to the 1st Defendant. By deed 1D1 tiled house and some plantation had been included and the 1st Defendant had the benefit of owning the house and some plantation. Therefore the District Judge has come to the conclusion that both Plaintiff-Respondent and 1st Defendant are entitled to undivided $\frac{1}{2}$ share each.

The 2nd Defendant-Appellant's case which I was able to gather from the Petition of Appeal and the written submission was that her parents have possessed the entire land well over the prescriptive period and the plantation and the building on the land also acquired by prescriptive title of her and her predecessors in title, possessed the entirety and thereby 2A Defendant-Appellant seeks to establish her rights to the corpus.

Parties proceeded to trial on 17 points of contest. The points of contests 12-14 raised on behalf of Appellant. On perusing the judgment I find that the trial court Judge has concentrated on the prescriptive title and expressed his views supported with the evidence led at the trial. I have

noted the following points in the judgment which does not prove exclusive and independent possession by the 2A Defendant-Appellant and her predecessors.

- (a) on the evidence of 2A Substituted Defendant who stated that the 2nd Defendant was her father who lived in the house at lot (1) of the above plan and that the house was built by the deceased 2nd Defendant and the plantation in the land was done by her father (2nd defendant) and grand-father. At a certain stage of the evidence of witness it is admitted by the witness that she is unaware as to who built the house and that the father (2D) told her that he built the house. In cross-examination she admitted that the house was the ancestral house where witness' grand-father, grand-mother all lived in it. (මහ මෙදුර). It was admitted by the witness that Suwandiris, her father (2D) and Nonachchi lived in this house. Suwandiris is the transferor of deed 1D1. As such there is no sole, independent occupation by 2nd Defendant. The other witnesses called on behalf of the 2nd Defendant could not testify or confirm the fact as to who built the house and certainly not the 2nd Defendant
- (b) Though 2A Substituted-Defendants deny occupation of Plaintiff-Respondent's document 2D2 being the Magistrate Court proceedings in Case No. 840/- which was put in evidence state that Plaintiff collected coconuts, jack, bread fruit from the land in dispute and that the 2nd Defendant admitted this fact in cross-examination in the said Magistrate's Court case (vide 2D2). As such Plaintiff's rights to the

property cannot be denied. Learned District Judge also considers the Magistrate's Court proceedings marked as P4 & P5. Judge's reasoning in the original court indicates that P4 & P5 could be considered as substantive evidence. As such Plaintiff enjoyed the fruits on the land as of his own rights.

- (c) Plaintiff and 2nd Defendant's mother Dingira had undivided ½ share rights to the property up to 1959. By P3 Dingira had in 1959 transferred her ½ share to Plaintiff. Dingira is the mother of the 2nd Defendant. It is evident that Plaintiff and Dingira being brother and sister lived in the same house. As such 2nd Defendant cannot claim adverse possession against her own mother. To explain further following to be noted from the judgment.

සිද්ධිවල ගතයනා වැඩිබර අනුව ඵලභිය හැකි වඩාත් සුසුදු නිගමනය වන්නේ පැමිණිලිකාරියගේ පෙර නිමකරූ වන ඩංගිරාගේ කැමැත්ත හා අවසරය පිට දෙවන විත්තිකරූ විෂය වස්තුව තුළ පිහිටි නිවසේ වාසය කර ඇති බවය. කෙසේ වෙතත් 1959 දී දෙවන විත්තිකරූගේ මව වන ඩංගිරා විසින් තමා ගේ අයිතිවාසිකම් දෙවන විත්තිකරූගේ සහෝදරිය වන පැමිණිලිකාරියට විකුණා ඇත. සාක්ෂිකාර වදානපතිරණගේ සාක්ෂියෙන් පෙනී යන්නේ විෂය වස්තුව තුළ පිහිටි නිවසේ දෙමව්පියන් සහ දෙවන විත්තිකරූද සමග පැමිණිලිකාරියද එකට වාසය කර ඇති බවයි.

- (d) No adverse possession could be established that could favour the 2nd Defendant at least until transfer of deed P3 (13th October 1959). 2nd Defendant in this instance need to prove an overt act. There is no such evidence and material to prove an overt act. As such court has to

presume that the 2nd Defendant continued to possess in the same way as from the beginning of her possession. No material adduced to prove independent adverse possession against Plaintiff-Respondent. The learned trial Judge refer to *Maduanwala v. Ekneligoda* 3 N.L.R 213...

“A person who is let into occupation of property as a tenant or as a licensee must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation”

(e) On the other hand perusal of documents P4 & 2V2 Magistrate's Court proceedings dates back to 1977. Plaint in this action filed only on or about 1983. If one argues that there is adverse possession by reference to P4 and 2V2 even from 1977 a period of 10 years being the required period under Section 3 of the Prescriptive Ordinance would not be satisfied.

In all the above circumstances of this case there is an absence of material to prove that the 2nd Defendant-Appellant has prescribed to the land in dispute. No independent and adverse possession has been established by the Appellant. Plaintiff-Respondent has placed enough material and proved his title i.e undivided ½ share to the property along with the 1st Defendant. Court cannot presume or surmise evidence. Learned District Judge has

considered all available material. All factual position taken up at the trial by way of evidence had been considered by the trial Judge. I see no basis to interfere with primary facts. Judgment of the District Court is affirmed. Appeal dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL