

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

S.A. Ariyadasa  
Waduwadaniya,  
Kirama.

**2<sup>ND</sup> DEFENDANT-APPELLANT**

C.A. 161/1997 (F)  
D.C. Walasmulla 227/P

Vs.

S. A. Dhanapala  
Weladagoda, Kirama.

**PLAINTIFF-RESPONDENT**

1. Kodikarage Nonnohamy (**Dead**)  
Kakiribada, Kirama.
- 1(A) S. A. Dhanapala  
Kakiribada, Kirama
- 1 (B) S. A. Amarasinghe  
Kirana, Kakiribada,  
Kirama.

**1(A) & 1(B) SUBSTITUTED  
DEFENDANT-RESPONDENTS**

3. S.A. Yasomamy  
Kakiribada, Kirama
4. S. A. Heenhamy  
Kakiribada, Kirama
5. S. A Jayasena  
Kakiribada, Kirama

6. S. A. Kirigoris  
Kakiribada, Kirama

**3<sup>RD</sup>, 4<sup>TH</sup>, 5<sup>TH</sup>, 5<sup>TH</sup>, DEFENDANT-RESPONDENTS**

7. S. A. Maryhamy (Dead)  
Kakiribada,,Kirama
- 7(A) L. Chandrapala  
Kakiribada, Kirama
- 7(A) Substituted Defendnat-Respondent
8. S. A. Misilana  
Kakiribada, Kirama
9. S. A. Amarasinghe  
Kakiribada, Kirama.
10. S. A. Francina  
Jathungewatte  
Devalagama.

**8<sup>TH</sup>, 9<sup>TH</sup>, 10<sup>TH</sup> DEFENDANT-RESPONDENTS**

And now between

S. A. Piyasena  
Madura  
Kakiribada,,Kirama.

**PETITIONER**

**(Party sought to be substituted as 2<sup>nd</sup> Defendant-Respondent)**

Vs.

S. A. Dhanapala  
Weladagoda, Kirama.

**PLAINTIFF-RESPONDENT-  
RESPONDENT**

1. Kodikarage Nonnohamy (**Dead**)  
Kakiribada, Kirama.
- 1(A) S. A. Dhanapala  
Kakiribada, Kirama
- 1 (B) S. A. Amarasinghe  
Kirana, Kakiribada,  
Kirama.

**1(A) & 1(B) SUBSTITUTED  
DEFENDANT-RESPONDENTS-  
RESPONDENTS**

3. S.A. Yasomamy
  4. S. A. Heenhamy
  5. S. A Jayasena
  6. S. A. Kirigoris
- All of Kakiribada, Kirama

**3<sup>RD</sup>, 4<sup>TH</sup>, 5<sup>TH</sup>, 5<sup>TH</sup>, DEFENDANT-  
RESPONDENTS-RESPONDENTS**

7. S. A. Maryhamy (**Dead**)  
Kakiribada,,Kirama
- 7(A) L. Chandrapala  
Kakiribada, Kirama
8. S. A. Misilana

9. S. A. Amarasinghe

Both of Kakiribada, Kirama

10. S. A. Francina

Jathungewatte

Devalagama.

**8<sup>TH</sup>, 9<sup>TH</sup>, 10<sup>TH</sup> DEFENDANT-  
RESPONDENTS**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** P. K. Prince Perera with S. Amarasekera for  
2<sup>nd</sup> Substituted-Defendant-Appellant

P. P. Alagiyawanna with N. Ratnayake  
for the Plaintiff-Respondent

**ARGUED ON:** 30.05.2011

**DECIDED ON:** 27.06.2011

**GOONERATNE J.**

This was a partition suit initially filed in the District Court of Tangalle and transferred to the District Court of Walasmulla. The 2<sup>nd</sup> Defendant-Appellant has filed this appeal to set aside the judgment of the learned District Judge dated 12.2.1997. The Appellant along with 3<sup>rd</sup> to 10<sup>th</sup> Defendants in terms of the judgment is entitled to ½ share (undivided) from

the corpus. (as in paragraph 7 of the plaint). Plaint in paragraph 6 reveal that the 1<sup>st</sup> Defendant is the wife of the deceased Jamis who was the owner of the land in dispute (vide paragraph 2 & 6 of plaint) and 2<sup>nd</sup> to 10<sup>th</sup> Defendants are the children of the above named Jamis. Parties raised 11 points of contest. The 2<sup>nd</sup> Defendant-Appellant claims the entirety of the land, on the basis that he has prescribed to same. Appellant denies that the original owner Jamis had prescribed to the land. Plaintiff's father Jamis had been in undisturbed possession for a period of 50 years or more according to the plaint. On or about 1956 one Baba Hamy filed action pertaining to the same land against the said Jamis in case No.L561, and that action was dismissed.

At the hearing of this appeal learned Counsel for the 2<sup>nd</sup> Defendant-Appellant contended that.

- (a) the plaint does not contain a schedule which shows the metes and bounds of the corpus and as such there is non compliance with Section 4 (B) of the Partition Act.
- (b) Plaintiff has not proved the case on a balance of probability
- (c) Documents P1 – P6 does not support the Plaintiff's case. More particularly since case L/561 was dismissed, and as such no benefit will derive to Plaintiff from such dismissal.
- (d) Learned District Judge has not considered documents 201 to 205.
- (e) Appellant by the said documents referred to in (d) above had prescribed to the entire land.

Learned Counsel for the Respondent inter alia submitted that

- (i) land in dispute had been properly identified in paragraph 2 of the plaint though the plaint does not contain a schedule
- (ii) that there is sufficient compliance with Section 4 of the partition Act.

- (iii) Appellants case is not in compliance with Section 150 of the Civil Procedure Code especially illustration or explanation (2) of same
- (iv) Appellant had been giving the share of the produce to the mother of the Appellant
- (v) The statement of Appellant in document P6 contradicts the Appellant's position and his statement of claim.
- (vi) Relies on the judgments in 60 NLR 481 & 53 NLR 354
- (vii) Draws the attention of court to certain items of evidence which favour the case of Respondent in folios 90, 109 – 110 & 112 of the brief – refer to contradiction of Appellant's evidence at folio 94.
- (viii) Support the findings of the learned District Judge in his judgment more particularly at folios 140 to 142, 144, 146, 150 - 153

The well considered judgment of the learned District Judge deals as from the point of time Jamis had title to the corpus called 'Lindagawadeniya'. The parties to this action are all members of one family the father being Jamis (deceased) and mother the 1<sup>st</sup> Defendant. 2<sup>nd</sup> to 10<sup>th</sup> Defendants are the children. Apart from Plaintiff's evidence of his father being the owner cultivator of the land named above up to 1966, such evidence had been corroborated by two other witnesses, one Sirisena from the Agricultural Board or 'Mandalaya' and the other witness Samel Liyanarachchi a Cultivation Officer. The following main points are established by way of evidence and the learned District Judge refer to same in his judgment.

- (a) Jamis had been the owner cultivator from 1950 to 1966 until his death.
- (b) After Jamis died the 2<sup>nd</sup> Defendant had been working or cultivating the paddy field in dispute and that the 2<sup>nd</sup> Defendant had given his mother the 1<sup>st</sup> Defendant her share of the produce.
- (c) At a certain stage when the 1<sup>st</sup> Defendant was not given her share the 1<sup>st</sup> Defendant complained and by P6 inquiry held by the relevant Agricultural committee.
- (d) Witness Samal Liyanarachchi confirm (c ) above and state that he had been instrumental in getting the share of the produce from the 2<sup>nd</sup> Defendant-Appellant to the 1<sup>st</sup> Defendant on 1<sup>st</sup> Defendant's complaint.
- (e) Case filed against Jamis bearing No. L 561 for unlawful possession and eviction of Jamis had been dismissed (P5) in favour of him.
- (f) Rejection of 2<sup>nd</sup> Defendant-Appellant's position that Jamis never possessed or owned the land in question.
- (g) P6 – inquiry reveal, that
  - (i) 2<sup>nd</sup> Defendant admits his father Jamis cultivating the paddy field
  - (ii) 2<sup>nd</sup> Defendant admits that he was not involved in cultivation during 1944 to 1966
  - (iii) Father's title admitted and that he was cultivating for long years.
  - (iv) 2<sup>nd</sup> Defendant does not deny title of other children as co-owners (3<sup>rd</sup> to 10<sup>th</sup> Defendant)

The learned Trial Judge's comments on the documents marked 201 to 206 marked in evidence by the 2<sup>nd</sup> Defendant-Appellants are important as he has analysed and criticized these documents as follows: (Folio 150)

- (a) 201 request to pay acreage tax , but no reference to the land in dispute and to 2<sup>nd</sup> Defendant.
- (b) 202 is an acreage payment, receipt No reference to the corpus. Defendant land
- (c) 203 notice to Defendant. No reference to corpus.
- (d) 204 & 205 summons no reference to the corpus.
- (e) 206 payment receipt.

Documents 2 ව1 - 2ව6 are rejected by the Trial Judge. Further 2ව1 & 2ව2 are hand written documents. No official seal.

This court does not wish to interfere with the Trial Judge's findings above as (a) to (e) are all factual matters of a primary nature; 1993 (1) SLR 119.

I would refer to the following findings of the learned District Judge, all of which are supported by evidence.

මෙම නඩුවේ ඉදිරිපත් වී ඇති සාක්ෂිවල සබන්ධතා වැඩි බර අනුව පැමිණිලිකරු විසින් කියා සිටින ආකාරයට පැමිණිලිකරුගේ පියා වන ජේමස් විසින් දිරිඝ කාලයක් තිස්සේ වෂය වස්තුව වන කුඹුර බුක්ති වඳ ඇති බව මම නිගමනය කරමි. 1966 දී ජේමස් මියයාමට පෙර අවුරුදු 10 ට වඩා අදින කාලසීමාවක් තුළ එකී ජේමස් විසින් වෂය වස්තුව අබන්ධව නිරවුල්ව හා ස්වාධීනව බුක්ති වදිමෙන් වෂය වස්තුවට කාලාවරෝධි හිමිකමක් ලබා සිටි බවද නිගමනය කරමි. ඒ අනුව 1966 දී ජේමස් මියයාමෙන් පසු ඔහුගේ අයිතිය බිරිඳ හා දරුවන් වෙත සාරෝපණය වන බවද නිගමනය කරමි. එමෙන්ම 1966 වර්ෂයේ ජේමස් මියයාමෙන් පසු 2 වන විත්තිකරු විසින් මෙම කුඹුර වගා කොට තම මවට ප්‍රවේනිය ලබා දී ඇති බවද, නිගමනය කරමි.

Trial Judge's findings on prescriptive title by an overact by the 2<sup>nd</sup> Defendant-Appellant has been well considered as follows. Trial Judge rejects the appellant's position as in folios 152/153... of the brief.



වි1 උධාතයෙන් පෙනී යන්නේ තමා විසින් මෙම කුඹුරේ ඉඩම හිමි ගොවියා වශයෙන් අවුරුදු 10 ක පමණ කාලයක සිට කටයුතු කර ගෙන යන බව 2 වන විත්තිකරු විසින් 1981.02.23 වන දින පැවති ගොවිපන සේවා පරීක්ෂණයේදී ප්‍රකාශ කර ඇති බවයි. 2ව8 ලෙස ඉදිරිපත් කර ඇති කෘෂිකාර්මික ඉඩම් ලේඛනයේ උධාතයෙන් පෙනී යන්නේ 1972 වර්ෂයේ දී 2 වන විත්තිකරු විෂය වස්තුව වන කුඹුරේ ඉඩම හිමි ගොවියා හැටියට තමාගේ නම කෘෂිකාර්මික ඉඩම් ලේඛනයට ඇතුළත් කර ගෙන තිබූ බවයි. කෙසේ වෙතත් මේ සම්බන්ධයෙන් සෙසු හවුල් අයිතිකරුවන් දැන සිටි බවට සාක්ෂි කිසිවක් මෙම නඩුවේ ඉදිරිපත් වී නැත. 2 වන විත්තිකරු විසින් කෘෂිකාර්මික ඉඩම් ලේඛනයට මෙම කුඹුරේ ඉඩම් හිමි ගොවියා වශයෙන් තමාගේ නම ඇතුළත් කර ඇති බවට සෙසු හවුල් අයිතිකරුවන් දැන සිටි බවට සාක්ෂි කිසිවක් ඉදිරිපත් වී නැති මෙවැනි අවස්ථාවක 2 වන විත්තිකරු එකී ක්‍රියාව තමාගේ බුක්තිය ප්‍රතිවරුද්ධ බුක්තියක් බවට පරිවර්ථනය වී ඇති බව විදහා පාහැඳිලි ක්‍රියාවක් (ovetact) වශයෙන් කිසිසේත් සැලකිය නොහැකිය. හවුල් පාර්ශවකරුවෙකුගේ සිත තුළ ඇති වන රහස් වේතනාවන් හවුල් බුක්තියක් අවසාන කිරීමට ප්‍රමාණවත් නොවන බව අප නීතියේ පිලිගෙන ඇති සිද්ධාන්තයයි. මේ සම්බන්ධයෙන් බස්නායක අග්‍ර විනිශ්චකාර තුමා ගුනවර්ධන එරෙහිව සමරකෝන් 60 එන්. එල්. ආර්. 481 පිටුවේ නඩුවේදී මෙසේ අවධාරනය කර ඇත.

### Gunawardene vs. Samarakoon 60 NLR 481...

Where a co-owner sought to establish title by prescription by proving that he was in possession of the common property for thirty five years –  
Held , that possession qua co-owner cannot be ended by any secret intention in the mind of the possessing co-owner. The possession of one co-owner does not become possession by a title adverse to or independent of that of the others till ouster or something equivalent to ouster takes place.

### Kobbekaduwa v. Seneviratne 53 NLR 359...

The mere fact that a co-owner who was in occupation of the common property purported to execute deeds in respect of the entirety of it for a long period of years does not lead to the presumption of an ouster in the absence of evidence to show that the other co-owners had knowledge of the transactions.

When I consider the case of each party to this appeal I cannot conclude that the Appellant has by clear evidence established ouster or that he exclusively enjoyed the land without recognizing the rights of others. As observed by the Original Court Judge the old case of Corea Vs. Appuhamy 15 NLR 65 Privy Council held, co-owners possession is in law the possession of his co-heirs. It is not possible by any secret intention in his mind to put an end to that possession. Nothing short of ouster or something equivalent to ouster could bring about that result.

It is essential that the Appellant establish that he enjoyed the land exclusively without recognizing others. He must also establish that he commenced to do so from a certain date and that ten years have lapsed from that date (68 NLR 40) I cannot find acceptable evidence of Appellant in this regard. Mere possession of a common land for a long period alone, by a co-owner cannot be regarded as adverse possession for the purpose of establishing prescriptive title.

The plaint sufficiently describe the land in paragraph 3 of the plaint with reference to its metes and bounds. Appellant did not object to the plaint in the Original Court. This sort of objections cannot be seriously considered in the Court of Appeal. Plaintiff has established his case on all matters acceptable in law. P1 – P6 support Plaintiff's case. Case L/561 was dismissed in Plaintiff favour (Plaintiff was Defendant in case No 561).

In all the circumstances there are no good acceptable grounds to fault the judgment of the Original Court. This is a well considered judgment of the District Judge. Appellant has not been able to urge cogent reasons to set aside the judgment of the learned District Judge. Appeal dismissed with costs.

Appeal dismissed

JUDGE OF THE COURT OF APPEAL