

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

In the matter of an appeal under  
and in terms of sec. 754 (1) of the  
Civil Procedure Code.

C.A. Appeal No. 1236/99 F

D.C. Panadura Case No. 1125/L

1) K. A. Somawathie Fernando

2) B. Gabriel Fernando

**Plaintiff-Appellants**

**Vs**

1) Weerasinghe Ranjith Silva

2) Deepika Malkanthi Silva

**Defendant Respondents**

Before : W.L.Ranjith Silva J. & A.W.A.Salam, J.

Counsel: Dr.Sunil Cooray for the Appellants R.C.Gunatratne for the Respondents

Argued : 08-10-10 and 10-02-2011

W/ sub : 03-03-2011

Decided: 05-05-2011

**W.L.Ranjith Silva, J.**

**T**he Plaintiff Appellants (Appellants) instituted a *rei vindicatio* action in the District Court of Panadura bearing No.1125/ L vindicating *inter alia*, his title to a land called Delgahawatte alias Thotagawa watte, (hereinafter referred to

as the Land) depicted in Plan No.387 dated 15-01-1978 prepared by B.L.D. Fernando Licensed Surveyor and more fully set out in the schedule to the plaint dated 7<sup>th</sup> May 1996.

The Appellants prayed for the following relief:

a) a declaration that the second plaintiff is the owner of the land described in the schedule to the plaint subject to the life interest of his wife the first plaintiff which land is depicted in plan number 378 dated 21st of January 1978 containing in extent one acre one-rood 13.2 perches.

2) For the removal of the temporary house forcibly constructed by the defendant in the said land and for the ejectment of the defendants and those holding under them, and for the restoration of the plaintiff's to the possession thereof.

3) Recovery of damages at the rate of Rs. 500/- per month from 13th of October 1995 until restoration of possession.

4) For costs and such other relief.

After trial the Learned District Judge dismissed the action holding that the evidence led in the case was insufficient to prove that the Appellants had acquired prescriptive rights to the entire Land in question against the other co-owners by an overt act amounting to an ouster. This appeal is against the said judgment of the Learned District Judge dated 12-10-1999.

According to the tenor of the pleadings the Appellants had lost his possession to the Land on or about 13-10-1996 (issue No. 06) and the Defendant Respondents were in forcible possession of it at the time of the institution of the action. The Appellants claimed his rights to a separate and distinct portion of a land of which he was a co-owner based on deeds admittedly conveyed only 3/10 share of a land and also on prescription.

**Prescriptive claims by parties ousted.**

In *Silva Vs Simon* 4 NLR 144 it was held that it is essential that a plaintiff who claims the benefit of section 3 of the Prescription Ordinance should be in possession when he brings his action. If the plaintiff has suffered ouster, his remedy under section 4 is to recover possession within one year of his dispossession, without going into the question of title. But if he acquiesces in his dispossession for a year, he must prove his title.

In *Dabare Vs Marthelis Appu* reported in 5 NLR at page 210 it was held that prescription is not usable in this country in the sense of *usucapio* in which it was used by Roman Dutch Law writers, because the effect of regulation No.13 of 1822 was to establish the law of *usucapio* and **to entitle a defendant in possession**, who has been sued by a plaintiff for the recovery of immovable property to a sentence in his favour" if for 10 years before the bringing of such action the defendant has been in undisturbed possession by a title adverse to and independent of the plaintiff.(Emphasis is mine)

Thus it is only a defendant in possession, who has been sued by a plaintiff for the recovery of immovable property, would be entitle to a sentence in his favour" if for 10 years before the bringing of such action the defendant has been in undisturbed possession by a title adverse to and independent of the plaintiff.

The question that arises here is whether a co-owner can maintain a possessory action against another co-owner. In *Rowel Appuhami Vs Moises Appu* ( 4 NLR.225) it was held that a possessory action was inappropriate where the defendant was admittedly a co- owner and if co-owners could not agree as

to the exercise of their common rights, the only appropriate remedy was an action for partition. (Emphasis is mine)

In *Perera Vs Fernando* (1 S.C.R at page 329) it was held that the possession of a co-owner is not such an exclusive possession which entitles him to a possessory action in the event of his being dispossessed.

In *Silva Vs sinno Appu* (7 NLR at page 5) the Supreme court held that, the owner of an undivided share of land can not maintain a possessory action in respect of such share, provided he joined the other co-owners as parties either as plaintiffs or defendants.( see also *Fernando Vs Fernando* 13 NLR 164)

But in *Heen Hami Vs Mohotti Hami* (19 NLR at page 335) the full bench of the Supreme Court decided that there is no rule of Law that a co-owner cannot maintain an action against another co-owner without joining all the co-owners of the land. (See also *Abeyrathna Vs Senevirathne* 1914 (3) Bal. N.C. page 22)

In *Cooray Vs Samaranayake* reported in 47 NLR at page 322 it was held that a co-owner who has been in possession of the **entire common property** for a year and a day *ut dominus* can maintain a possessory action against a co-owner who thereafter ousts him. ( emphasis is mine )

The character and scope of a *rei vindicatio* action, which involves the question of title and rights pertaining to ownership, are distinct from that of a possessory action. The Appellant's action as presently constituted should therefore be dismissed, if he fails to establish the right to possess the corpus based on prescriptive possession or such other modes of ownership. The Appellant has set out title to an undivided 3/10 share of the land but nowhere has he stated, either in his plaint or evidence, the devolution of title to the balance 7/10 shares of the land. The Appellants have failed to name a single co-owner of the land as a party to the action either as a defendant or a plaintiff. The Appellants have not

pleaded or stated in evidence that he possessed a portion of the land, in respect of which he claims prescriptive title, adversely, independently and exclusively against the other co-owners or that he became entitled to the said land on the basis of ouster. In this case the Appellants are not seeking a declaration of title to his undivided share of the land. The Appellants have pleaded that he possessed the land depicted as lot one in the plan above referred to in lieu of his undivided share. Therefore it appears that the plaintiff cannot stop adducing evidence of paper title to an undivided share. The Appellants do not even admit that the Respondents are co-owners. The Appellants cannot claim in this action that he is a co-owner or that he prescribed against the other co-owners or that he acquired title by ouster on the basis of possession adverse, independent and exclusive as against the other co-owners who are not made parties to the action.

In *Hariette Vs Pathmasiri* 1996 1 SLR at page 358 N.J.Silva, J. as he then was, opined;

"Plaintiff produced title deeds to undivided shares in the land but her action being one for declaration of title to the entirety, she cannot stop at producing evidence of paper title to an undivided share. It was her burden to adduce evidence of exclusive possession and acquisition of prescriptive title by ouster in respect of the entire land."

His Lordship in that case held I quote; "Our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejection of the trespasser from the whole land because the owner of an undivided share has an interest in every part and portion of the entire land But such was not the case formulated by the Plaintiff."

In *Attanayake Vs Ramyawathie* 2003 1 SLR 401, the original plaintiff sued the defendant for a declaration of title to the land in suit and ejection. The plaintiff did not refer to herself being a co-owner of the land in dispute. The defendant

too claimed ownership to the same land. The evidence showed that the title to the allotment of land in suit was to be divided among seven persons. The plaintiff failed to prove exclusive (prescriptive) title to the larger land. It was held; I quote, " Although the plaintiff might have been entitled to a declaration of title to a portion of the land as co-owner of the entire land, she failed to adduce evidence of ownership for a portion of the larger land claimed by her by prescription or ouster. In the circumstances of the case, the plaintiff was not entitled to the relief of declaration of title.

For the foregoing reasons adumbrated by me on the facts and the law I hold that the action filed by the Appellants is misconceived and the Learned District Judge is quite correct in his findings and conclusions hence there is no justifiable reason for this court to interfere with the judgment of the learned district judge. Accordingly I dismiss this appeal with costs fixed at Rs.5000/= to be paid to the Respondents by the Appellants.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

A.W.A.Salam, J.  
I agree,

**JUDGE OF THE COURT OF APPEAL**