

In the Court of Appeal of the Democratic Socialist

Republic of Sri Lanka

Abeywansa Leelanatha Wettasinghe

No. 101, Newdawa,

Alubomulla.

PLAINTIFF

C.A. No. 272-273/94(F)

D.C. Panadura Case No. 66/P

Vs.

1. Pushpa de Silva Withanachchi,
Newdawa, Aruggoda,

Alubomulla.

2. Rukmani Silva Withanachchi,
Newdawa, Aruggoda,

Alubomulla.

3. Habaragamuralalage Sarath Gamini Peiris,
Newdawa, Aruggoda,

Alubomulla.

4. D.A.B. Senaratne,
No. 15, "Sevana"

2nd Lane, Kudamulla,

Moratuwa.

5. P.D. Senaratne,
No. 15, "Sevana"

2nd Lane, Kudamulla,

Moratuwa.

6. D.L. Senaratne,
No. 15, "Sevana"
2nd Lane, Kudamulla,
Moratuwa.
7. Mangala Wettasinghe,
Thalokoladuwa, Newdawa,
Aruggoda, Alubomulla.
8. Lal Wettasinghe,
Thalokoladuwa, Newdawa,
Aruggoda, Alubomulla.
9. Luxman Wettasinghe,
No. 101, Newdawa,
Aruggoda, Alubomulla.
10. Pulukkuttiralalage Kusumawathie,
Adikarimulla, Dunagaha.
11. Willegoda Wickremage Karlina Illeperuma
Arachchi Alias Karunawathie,
Newdawa, Aruggoda,
Alubomulla.

AND

Abeywansa Leelanatha Wettasinghe
No. 101, Newdawa,

Alubomulla.

PLAINTIF-APPELLANT

Vs.

3. Habaragamuralalage Sarath Gamini Peiris,
Newdawa, Aruggoda,

Alubomulla.

3RD DEFENDANT-APPELLANT

1. Pushpa de Silva Withanachchi,
Newdawa, Aruggoda,

Alubomulla.

2. Rukmani Silva Withanachchi,
Newdawa, Aruggoda,

Alubomulla.

4. D.A.B. Senaratne,
No. 15, "Sevana",

2nd Lane, Kudamulla,

Moratuwa.

5. P.D. Senaratne,
No. 15, "Sevana",

2nd Lane, Kudamulla,

Moratuwa.

6. D.L. Senaratne,

No. 15, "Sevana",
2nd Lane, Kudamulla,
Moratuwa.

7. Mangala Wettasinghe,
Thalakoladuwa, Newdawa,
Aruggoda, Alubomulla.

8. Lal Wettasinghe,
Thalakoladuwa, Newdawa,
Aruggoda, Alubomulla.

9. Luxman Wettasinghe,
No. 101, Newdawa,
Aruggoda, Alubomulla.

10. Pulkuttiralalage Kusumawathie,
Adikarimulla, Dunagaha.

11. Willegoda Wickremage Karlina
Illeperuma
Arachchi Alias Karunawathie,
Newdawa, Aruggoda, Alubomulla.

DEFENDANT-RESPONDENTS

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

Counsel : Rohan Sahabandu for the Plaintiff-Appellant
and the Plaintiff- Respondent. R.C. Gunaratne for the 11th Defendant-
Respondent. Ananda Kasturiarachchi for the 3rd Defendant-Appellant and
3rd Defendant-Respondent.

Argued on : 28/06/2010

CA 272-273/94 F

DC Panadura Case No 66/P

Written Submissions tendered on : 11/10/2010

Decided on : 23/02/2011

A W Abdus Salam, J

This judgment relates to two distinct petitions of appeal preferred against a decision entered at the conclusion of a partition action. The plaintiff has filed appeal bearing No CA 272/94 F and defendant CA 273/94 F.

The land in respect of which the partition suit has been filed is known as Gorakagahawatta which is depicted as lots 1 and 2 in the preliminary plan No 621 produced at the trial marked as X. The extent of lot 1 is 3 roods and 21 perches and lot 2 is 1 Rood and 24 perches. The Southern boundary of lot 1 and the Northern boundary of lot 2 is a public Road. Similarly, the Eastern boundary of lot 1 and Western boundary of lot 2 are also roads running along the said boundaries.

According to the plaintiff, the original owner of an undivided 1/4 share of the corpus was one Juvanis Appuhamy whose rights he claimed had devolved at a certain point of time on his children Don Sadiris, Don Lewis, Sepochi Hamine, Kithchchihamine, Liso Nonnohamine alias Abilinahamine and Podinonohamine. The

plaintiff maintained that the balance 3/4 share of the corpus was possessed by Juvanis Appuhamy and he prescribed to the same. Consequently, the plaintiff claimed that undivided shares of the corpus, devolved on the parties in the following manner.

Plaintiff - 2136/126000

1st defendant - 1780/126000

2nd defendant - 1780/126000

3rd defendant- 21182/126000

4th defendant- 712/126000

5th defendant- 712/126000

6th defendant- 712/126000

7th defendant- 445/126000

8th defendant- 445/126000

9th defendant- 50244/126000

10th defendant- 2136/126000

To be Unalotted - 43716/126000

The 11th defendant took up the position that lot 1 in the preliminary plan formed a separate land called 'Ambagahawatte'.

Nevertheless, for reason of his own, the 3rd defendant did not suggest any point of contest as to whether Lot 1 formed a different land called 'Ambagahawatte'. He relied on his long and undisturbed and exclusive prescriptive possession of Lot 1, to claim exclusion of it from the subject matter. The learned District Judge having carefully analyzed the evidence adduced, came to the finding that the 11th defendant has prescribed to Lot 1 depicted in the preliminary plan.

The counsel of the plaintiff-respondent and 3rd defendant-respondent/appellant have submitted that the trial judge could not have possibly held in favour of the 11th defendant on the question of prescription to Lot 1, as he has failed to raise such a point of contest. He further submits that the position of the 11th defendant was that lot 1 formed part of a different land known as AMBAGAHAWATTA which the learned district judge has rejected. Arising from the said rejection, counsel submits that lot 1 in the preliminary plan should be considered as part and parcel of the corpus and therefore the 11th defendant could not have been declared entitled to Lot 1 by right of prescription.

At this stage it is appropriate to examine the impugned judgment with a view to ascertain the basis on which the 11th defendant has been declared entitled to Lot 1. According to the trial judge

the improvements in Lot 1 have been claimed only by the 11th defendant. Even though the plaintiff and certain other defendants were present at the survey, except the 11th defendant no one else had made any claim to the plantations or improvements in Lot 1. The learned district judge has observed that the subsequent claim made by the plaintiff to the plantations in Lot 1 by an affidavit (P11) was an afterthought to circumvent the consequences of his failure to prefer a claim at the preliminary survey to the plantations in Lot 1. This observation in my opinion cannot be strictly considered as evidence against the plaintiff as has been done by the learned district judge. However, on a perusal of the evidence led at the trial even without this observation there has been sufficient evidence led at the trial to establish the prescriptive possession of the 11th defendant in respect of lot 1.

The plaintiff and the 3rd defendant/appellant have raised the question as to whether Lot 1 can be declared entitled to the 11th defendant by right of prescription, in the absence of any issues raised to that effect. It is significant to observe at this stage that the learned district judge has held in favour of the 11th defendant as regards the question of prescription by answering point of contest No 12. In answering the said point of contest the learned district judge has stated that the 11th defendant has prescribed

to the said lot 1, as stated in paragraph 13 of the 11th defendant's statement of claim. For purpose of completeness, let me first reproduce paragraph 13 of the statement of claim of the 11th defendant. (vide page 130 of the brief)

ඉහත 11 වෙනි විත්තිකාරිය සහ ඇගේ පුර්ව
අයිතිකරුවන් මෙම දේපළ අඛණ්ඩව නිරවුල්ව අවුරුදු 10
කට අධික කාලයක් බුක්ති විඳ මෙම දේපලෙහි
අයිතිකාරිය විය.

Point of contest 12 reads as follows (vide page 344 of the
brief)

ඉහත සඳහන් 621 දරණ පිඹුරේ අංක 1 දරණ කට්ටිය 11 විත්තිකරුගේ
නිමිකම් ප්‍රකාශයේ සඳහන් පරිදි ඇයට නිමි වී ඇද්ද?

The finding of the learned district judge as regards lot 1 is as follows..

ඒ අනුව එම කැබැල්ල අවුරුදු 10 වැඩි කාලයක්
ප්‍රතිවිරුද්ධ අයිතියක් මත 11 වෙනි විත්තිකාරිය සහ
ඇගේ පුර්වගාමීන් බුක්තිවිඳීම හේතුකොටගෙන 11
විත්තිකාරියට ඊට කාලාවරෝධී අයිතියක් ලැබී ඇති
බවට විනිශ්චය කරමින් 12 වන විසඳිය යුතු ප්‍රශ්නයට
ඇගේ නිමිකම් ප්‍රකාශයේ 13 වන ඡේදයේ සඳහන්

කර ඇති පරිදි වූ කාලවරෝධි බුක්තියේ අයිතියක්
ඇයට හිමි වී ඇති බවට විනිශ්චය කරමි. ඒ අනුව
අංක 1 කැබැල්ල විෂය ටස්තුවෙන් ඉවත් කරමි.

Therefore, it would be seen that the learned district judge has ruled on the question of prescription strictly guided by the particular point of contest. As he has decided that the 11th defendant has acquired a valid prescriptive title to the corpus, namely a distinct and separate portion of Gorakagahawatta the learned district judge should have declared the 11th defendant to have acquired a prescriptive title to that portion of the subject matter, without excluding the same from the corpus. Accordingly the 11th defendant would be entitled to an undivided 3 roods and 21 perches from and out of the corpus which the learned district judge should have directed to be allotted to the 11th defendant at the final scheme of partition as far as practicable from and out of lot 1 depicted in the preliminary plan. **The learned district judge will accordingly make the necessary amendments to the interlocutory decree.**

As regards the identity of the corpus and the improvements, there had been serious contests among the

plaintiff, 3rd defendant and the 11th defendant. The 3rd defendant has claimed the plantations and the improvements in Lot 2 and also attempted to set out a prescriptive claim for that lot. As has been correctly observed by the learned district judge the 3rd defendant is a co-owner of the subject matter in terms of the averments contained in the plaint. Further, according to the deeds produced marked as 3D1 and 3D2 (deeds of transfer 3593 and 3578) the 3rd defendant has purchased undivided rights. Hence, the 3rd defendant is admittedly a co-owner of the subject matter. The learned district judge has correctly observed that the failure on the part of the 3rd defendant to prove ouster by an overt act stands in the way of the prescriptive claim of the 3rd defendant to lot 2 and therefore his claim for prescription should necessarily fail. I am totally in agreement with the finding of the learned district judge on this matter as it is quite consistent with the evidence led at the trial and the law applicable.

In the circumstances, I am of the view that the grounds of appeal relied upon by both appellants should necessarily fail. Hence, both appeals stand dismissed. Judgment of the district court affirmed subject to the variation made at

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page 10 of this judgment. There shall be no costs of this appeal.

Judge of the Court of Appeal

NT/-