

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

Warnakulasooriya
Mahalekamge Rita Petrishiya
Fernando.
Galasapitiya,
Hiruwalpola (Post)

PLAINTIFF

C.A. No: 595/94F
D.C.Kuliyapitiya
Case No:6658/P

- Vs -

1. Munasingha Arachchige
Pius Perera,
Galisapitiya,
Hiruwalpola.(Post)
2. Wijesinghe Hettiachci
Mudiyanselage
Chandrasena,
Ihala-Weerakodiyana,
Weerakodiyana.(Post)

DEFENDANTS

AND

Munasingha Arachchige
Pius Perera,
Galisapitiya,
Hiruwalpola (Post)

**1ST DEFENDANT-
APPELLANT**

-Vs -

Warnakulasooriya
Mahalekamge Rita Petrishiya
Fernando,
Galasapitiya,
Hiruwalpola (Post)

**PLAINTIFF-
RESPONDENT**

Wijesinghe Hettiachci
Mudiyanselage
Chandrasena,
Ihala-Weerakodiyana

Counsel : Lasith Chetthiya for the
Defendant/Appellant.
M.C.Jayaratne for the
Plaintiff/Respondent.

Written submissions :8-2-2010

Before : Rohini Marasinghe J

Judgment :21-1-2011

CA 595/94

Rohini Marasinghe J

The Plaintiff/Respondent herein after referred to as the plaintiff instituted a partition action in the District Court of Kuliyaipitiya. As described in the schedule to the plaint, the plaintiff by the said partition action sought to partition the land called “ Katakalahawatte” which is depicted as lot “A” in plan bearing No 413 dated 14-10-1964, surveyed by Licensed Surveyor B.A.S. Figurado.

The defendant by his statement of claim sought dismissal of action. After trial the judgment was entered in favour of the plaintiff. And the

Interlocutory Decree was entered to partition the land as pleaded by the plaintiff. This appeal is against that judgment.

On a commission issued by court the said land was surveyed on 26-12-1982 by Licensed Surveyor Thannegedera. The said plan bearing No 268/82 was marked as "X" at the trial. The surveyor's report was marked as "Y". As the defendant had averred that the land in issue was an undivided part of a larger land another commission was issued by court. Consequent to that commission the land was surveyed by Licensed Surveyor R.B. Nawaratne on 26-8-1985, and the plan bearing No 1983 was marked as "X1". The plan bearing No "X1" was obtained by superimposing the plan bearing no "X." The trial judge had examined both these plans and made the determination that the plan marked as "X" depicts the land to be partitioned. The appellant has not shown this court any reasons against the decision of the trial judge as to the identity of land to be partitioned.

The only issue that was addressed by the appellant to this court was with regard to the prescriptive title.

The followings facts were not in dispute;

The original owners of this land were the parents of the appellant. The appellant had 5 siblings. Out of the 5 siblings two siblings were Charlis and Sebastian. The parents had transferred the land in issue to each of the 6 children by deed bearing No 2055 dated 25-10-1964. Consequently, each were entitled to an undivided 1/6th share of this land. The said deed was marked as P1. The appellant had purchased the shares of two siblings namely, Joseph and Jamis by deed no 10852 dated 10-4-1979. The said deed was marked 1 V2. The appellant was living on this land. The parents were also living on this land until their deaths.

It is common ground that the original owners of this land were the parents of the appellant. However, with the execution of P1 the title of the parents to this land comes to an end. Therefore, the parents only had the life interest to the land which also came to an end with their deaths.

The plaintiff bases his right on deeds bearing nos. 330 dated 3-3-1977 marked as P2 , deed no. 439 dated 24-10- 1977 marked as P3, and deed no. 767 dated 29-1-1979 marked as P4.

The defendant's claim was on deed bearing No 10852 dated 10-4-1979 which was marked as 1 V2. He also claim title under section 3 of the

Prescription Ordinance on the ground that he had been in undisturbed and uninterrupted possession of the entire land for over 10 years which entitles him to a decree in his favour. Consequently, the defendant had asked that he be declared entitled to the entire land to the exclusion of all other co-owners. The defendant had given evidence and spoke to the enjoyment of the land in issue.

The plaintiff maintained that the land to be partitioned was not the exclusive property of any one person.

When a land is owned in common, there must clear evidence of ouster of all other co-owners by the co-owner who claims that he enjoyed the land exclusively without recognizing the rights of the others. In this case the defendant claimed that the co-owner named Charlis had delivered to the defendant his right to possess the share owned by Charlis. In support of this submission the defendant had marked a letter given to him by Charlis as 1V1. The defendant claimed that the letter 1V1 amounted to an outster. I cannot agree with the submissions of the defendant on this point. I am of the view that the letter 1 V1 could not have conveyed the land to the defendant. At the most the said letter amounts an agreement to sell. According to 1V1 the witness Charlis had accepted Rupees 200 from the defendant, subject to

the condition that a proper deed would be executed in due course. That agreement was in 1973. But a deed was never executed. And in 1977 Charlis had sold the land to the plaintiff by deed No 330. The evidence of Charlis was that he did not sell the property to the defendant. Nevertheless, the document 1V1 could not be considered as a valid document to transfer land. The co-owner Charlis had denied the position of the defendant. The learned trial judge had accepted the evidence of Charlis on this point. Therefore, with that evidence it must be conceded that the defendant had possessed the property through out as a co-owner accepting the ownership of another co-owner. In that event the defendant cannot claim the share of the other co-owner. Consequently, the appeal of the defendant should be dismissed.

The appeal is dismissed.

Rohiri Marasinghe. J