IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

C.A. 141/98 F
C.A. 141A/98 F
C.A. 141B/98 F
C.A. 141C/98 F
D.C. Mount-Lavinia 57/94/P

7. Jamburegoda Gamachchige Siripala, 32, Madiwela, Kotte

8. Labugamage Somalatha Perera, 324, Thalapathpitiya Road, Madiwela, Kotte

11. Suraweera Arachchige Dona Idinona, 16/10, Praja Road, Madiwela, Kotte

Defendant-ppellants In 141/98 F

9. Upul Pranawithana, 145, Rampart Road, Ethulkotte, Kotte

Defendant-ppellants In 141A/98 F

10. Mangala Seneratna, No 16/10, Praja Road, Madiwela, Kotte

Defendant-ppellants In 141B/98 F

13. Wilarachchige Dumita Malani Fernando,
20/2, Praja Road, Madiwela, Kotte

Defendant-ppellants In 141C/98 F

Vs

1. Welikadage Amarawathie Boteju,
   95, Madiwela, Kotte
2. Malawattage Jinasena Pieris,
   18/12, Obahena Road, Madiwela, Kotte.
3. Niranjan Ekanayaka Kalupahana,
   126, Stanley Thilakaratna Mawatha, Nugegoda

Plaintiff-Respondents in C.A. 141/98 F,
C.A. 141A/98 F,
C.A. 141B/98 F,
C.A. 141C/98 F
and others

BEFORE: A W A SALAM, J

COUNSEL: Ranjan Suwandaratna for the 10th defendant-appellant, C Premathilaka for the 9th defendant-appellant, Rohan Sahabandu for 7th 8th and 11th defendant-appellants and S N Tirimanne for the plaintiff-respondents.

ARGUED ON: 10.09.2012.

Written submissions tendered on: 26.11.2012

DECIDED ON: 20.02.2013

A.W.A. Salam, J.

These appeals have been preferred against the judgment dated 8 December 1997, delivered in a partition action. The appeals have been sought by the 7, 8 and 11 defendant-appellants, 10 defendant-appellant, 13 defendant-appellant and 9 defendant-appellant. This judgement relates to all such appeals, as they were consolidated and argued together and agreed to be decided simultaneously by one single judgment. Besides, the argument advanced by the appellants' in all the appeals centres round one single issue. That is whether the corpus had been originally possessed by one person as claimed by the appellants or whether it was co-owned from the beginning as urged by the plaintiffs.

Turning to the sequence of events that occurred prior to the appeals, the three plaintiffs brought a partition action against 1st to 6th defendants by plaint dated 11.03.1994

seeking to partition the land called Kongahawatta alias Ketakelagahawatta in extent of 02 roods and 37.6 perches depicted at one point of time, by Plan No. 873 made by Henry J Silva Licensed Surveyor dated 10.06.1934. The said plan was merely referred to in the plaint and certain deeds but not produced at the trial.

The plaintiffs by their plaint sought the corpus to be partitioned among them in the proportion of 1/6 share each aggregating to 1/2 share and the balance 1/2 share to the six defendants in the 1/12 share each aggregating to another 1/2 share.

The plaintiffs traced the ownership of the subject matter to two persons by the names (1) Labugamage Carlina Perera and (2) Labugamage Pubilis Perera in equal shares. According to the plaintiffs' the rights of Labugamage Carlina Perera had finally devolved on the plaintiffs on a chain of title set out in the plaint and the undivided rights of Labugamage Pubilis Perera on the 1st to 6th defendants.

7th - 14th Defendants filed statements of claim seeking the dismissal of the partition action. Somewhat persistently, they maintained that Labugamage Pubilis Perera, (referred to by the plaintiffs as the original owner of an undivided one half share of the corpus) from the year 1934 was in exclusive possession of Lot 5 in Plan No. 873 made by Henry J Silva Licensed Surveyor dated 10.06.1934 in lieu of his 8/40 share.

The land depicted in plan No. 873 is the same as the land described in the schedule to the plaint and almost identical to the land depicted in the preliminary plan. The basis on which the 7th to 14th defendants sought the dismissal of the partition action was that upon the death of the said Pubilis Perera, his six children (01st to 06th Defendants) amicably divided the corpus among themselves in terms of plan No. 1492 made by C. C. Wickramasingha, Licensed Surveyor dated 05.11.1973 (produced at the trial marked as 7 වී 1). On the footing of the said plan 7 වී 1 Lot 5 in Plan No. 873 had been sub-divided into six allotments of land as Lots E1 to E6. The six children of Pubilis Perera have placed their signatures on the reverse of 7 වී 1 purportedly demonstrating their intention to put an end to the co-ownership of the corpus although there was no contemporaneous formal deed of partition executed. However, a belated attempt has been made by the 1st to 6th defendants virtually 6 years after the preparation of the partition plan, to give formal recognition to the amicable partition when they subscribed to an amicable deed of partition bearing No. 4872 (marked 7 වී 2) attested by D.C. Senarathna, Notary Public on 02.08.1979. By virtue of the said amicable partition, the contesting defendants maintained that the 01st to 06th defendants became entitled to the defined and divided lots E4, (01st), E3, E6, El, E5, and E2 respectively. Consequent to the 1st to 6th defendant having become entitled to the several distinct allotments of land referred to above, the 07th to 14th Defendants claimed that by virtue of transfer deeds effected by 1st to 6th

defendants the 7th defendant became entitled to Lot E4, 8th defendant to lot E3, 9th defendant to lot E6, 10th defendant to El, 11th defendant to lot E5 and 12th and 14th defendants to lot E2. There is no dispute that Lots E4, E3, E6, El, E5 and E2 referred to above are identical to Lots 3, 5,7,1,6 and 2 respectively depicted in the preliminary plan No. 699. The deeds by which the 07th to 14th Defendants had derived title had been executed from time to time commencing from 1979 to 1989. The partition action has been instituted on 11.03.1994 roughly five years after the last deed had been executed by one of the children of Pubilis Perera.

The trial commenced on 28.01.1997 with the recording of an important admission whereby the parties conceded that the corpus constitutes of lots 1 to 7 depicted in the preliminary plan No 699 marked as X. The investigation of title began with the learned district judge identifying the points of contest as follows.

1. Were Labugamge Carlina Perera and Labugamage Pubilis Perera the original owners of the corpus?

2. Did the rights of the original owners devolve on the parties as stated in the plaint?

(The above points of contest were suggested by the plaintiffs)

3. Was Pubilis Perera the original owner of the

corpus?

4. Are the contesting defendants entitled to his rights as pleaded in the statement of claim?

5. Are the parties entitled to prescriptive rights claimed in their respective statements of claim?

6. If the plaintiffs are not entitled to any rights from the corpus, should the action be dismissed?

(Points of contest No's 3 to 6 were suggested by the contesting defendants)

As far as the examination of the title is concerned, it is of paramount importance to understand the basic factual issue arising on the devolution of title. According to the plaintiffs there were two original owners of the subject matter of the action. Conversely, the contesting defendants maintained that there was only one original owner. In the judgement the learned district judge answered the first two points of contest raised at the instance of the Plaintiffs' in the affirmative holding that there were two original owners of the subject matter. Arising from the answer given to the first point of contest, the learned district judge quite rightly answered point of contest No 3 in the negative, rejecting the position that the corpus was originally owned by one person. As regards the entitlement of the contesting defendants, the learned district judge held that Pubilis Perera had only an undivided one half share in the land

and therefore the contesting defendants are only entitled to that share of Pubilis Perera. As a result the District Judge allotted 4/24th share each to the Plaintiffs, 2/24th share each to the 4th, 7th, 8th , 9th and 12th & 13th Defendants and 1/24th share each to 11th & 14th Defendants. The improvements of the lots which were claimed by the 7th to 14th Defendants had been allotted to them.

The learned trial judge in his judgment, at the outset, had attempted to ascertain as to whether the corpus was in the joint-ownership of Labugamage Karlina Perera & Labugamage Pubilis Perera or only Labugamage Pubilis Perera. According to the 01st Plaintiff Labugamage Karlina Perera is her grandmother & Labugamage Pubilis Perera is a brother of her grandmother. In other words Labugamage Karlina Perera and Labugamage Pubilis Perera are siblings.

The trial judge has considered Deed No. 3689 dated 06.11.1949 produced as PI, by which the father of the 1st Plaintiffs (Davith Boteju) has transferred undivided rights from and out of Lot E in Plan No. 877 dated 10.06.1934 to Ruban Perera. On the death of Ruban Perera, the learned district judge has the conclusion that his undivided rights from and out of the corpus had devolved on the 01st Plaintiff under and by virtue of his last will which is said to have been proved in the district court of Colombo and thereafter she has executed an executor's conveyance No. 1175 dated 20.10.1960 (P2) in her favour. The failure of the plaintiffs have used the last of Ruban Perera was pointed

out by the contesting defendants as a serious lapse in the presentation of plaintiffs case. However, the district judge concluded that he had no reason to disbelieve PI and that if PI is true then Karlina Perera was entitled to half share of the corpus.

It is true that the plaintiffs have failed to produce the last will, probate or inventory in the testamentary case of Ruban Perera in case no. 18954/T. However, they produced the Executrix Conveyance no. 1775 dated 20.10.1960 attested by J. Wilson Notary Public of Colombo as "P2" along with the relevant land registry extracts.

The learned counsel for the plaintiffs has submitted that in addition to the production of the oldest deed (P1) the plaintiffs have adduced the Executrix Conveyance which indicates the conclusion of a testamentary action. Hence, it is admitted on behalf of the plaintiffs in light of the evidence produced, the probate or the other documents as stated by the Appellants are not necessary as there is a valid Executrix Conveyance registered in the folio which itself is evidence that the Testamentary case has been concluded.

It is settled law that immediately upon the demise of any person, his properties, both movables and immovables devolve on the legal heirs according to the law of inheritance governing the deceased or according to his last will. The question that arises here is whether the executrix

conveyance can be relied upon as proof of the fact that Ruban Perera left a last will in favour of the 1st plaintiff. The 1st plaintiff in her evidence has categorically stated that her husband died leaving a last will in her favour and that it was proved in the relevant Testamentary proceedings. Upon being asked as to whether she is able to produce the last will, the 1st plaintiff stated that she is unable to trace the last will and case record pertaining to the testamentary proceedings has gone missing. As a matter of fact, the 1st plaintiff in her testimony explained the circumstances that resulted in her inability to produce the last will. In any event the contents of the document the executrix conveyance (P2) have not been challenged by the defendants. So much so, the assertion of the 1st plaintiff that the husband died leaving a last will in her favour bequeathing an undivided 1/2 of the corpus and the said last will having been duly admitted to probate in the district court of Colombo had been neither denied by the contesting defendants nor did they cross examine the 1st plaintiff on that matter.

Quite significantly, none of the contesting defendants had chosen to impeach the genuineness of P2. The document marked as P2 had been produced without any objection. Wimalawathie Vs Hemawathie 2009 SLR – Volume 1- page 95, it was held that the finding in relation to the want of proof of the documents produced, blatantly contravenes Section 68 of the Partition Law, which provides that it shall not be necessary in any proceedings under that law to

adduce formal proof of the execution of any deed which on the face of it, purports to have been duly executed unless the genuineness of that deed is impeached by a party claiming adversely to the party producing the deed or unless the Court requires such proof.

In the instant case not only the genuineness of P2 had not been impeached by the contesting defendants but the contents of P2 also had not been questioned. Further, as has been adversely commented by the learned district judge the legal heirs of Pubilis perera (1 to 6 defendants) had not come forward to give evidence to warrant and defend the title of 7 to 14 defendants. It is also interesting to note that no steps have been taken by 7 to 14 defendants to call them or any one of them as witnesses. In the circumstances, it is my considered view that he learned district judge cannot be faulted for drawing an adverse inference resulting from the failure on the part of 1 to 6 defendants to give evidence or the failure on the part of the 7 to 14 defendants to call them as witnesses.

Undoubtedly, the learned district judge has had the priceless advantage of seeing the witnesses and the manner in which they testified. He has expressed a firm opinion as to the credibility of the witnesses. As such, this court should not lightly interfere or defer from the findings of the learned district judge based upon the oral testimony given before him and the documents produced at the trial.

The plaintiff has clearly proved his title to the subject matter and the defendants' claim for prescriptive title had been comparatively weak and unsatisfactory. By reason of the fact that the learned district judge had come to the finding that the corpus was originally owned by two people, it is incumbent upon 1 to 6 defendants to prove ouster by an overt act, so as to prescribe to the entire corpus against the other co-owners. The contesting defendants have not even suggested a point of contest as to their distinct mode of prescription to the entirety of the corpus against the other co-owners.

Several important principles touching upon the Law of prescription have been succinctly laid down in the celebrated judgment of Corea Vs Iseris Appuhamy 15 NLR 65 in which it was categorically laid down that where a person enters into possession of land in one capacity, he is presumed to continue in possession in that same capacity. The head note of that judgment reads as follows....

> "A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result".

In the case of Thilakaratna Vs Bastian 21 NLR 12 it was held *inter alia* that where possession of immovable property

originally is not adverse, and in the event of a claim that it had later become adverse, the onus is on him who asserts adverse possession to prove it. Then proof should be offered not only of an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession.

Quite remarkably, no cogent evidence had been led at the trial pointing to the possession of the legal heirs Pubilis Perera or the 7th to 14 the defendants as being adverse. In the absence of proof emanating from ouster by an overt act the 1st to 14th defendants should necessarily be presumed to have continued as co-owners.

In the circumstances, the learned district judge had no alternative but to enter judgment to partition the land on the basis that it was originally co-owned as urged by the plaintiffs'. In order to come to this conclusion he has examined the deeds produced by the plaintiffs and the manner in which the plaintiffs' predecessors have dealt with the property.

Having examined the reasoning adopted by the learned district judge on the finding as to the original ownership of the corpus, I am not inclined to subscribe to the view that the said finding and the reasons adopted are inconsistent with the evidence (both oral and documentary). Hence, no intervention of the appellate court is warranted in respect of the said finding.

Appeals dismissed subject to the agreement reached to the effect that the benefits accrue to the 4th defendant by virtue of the judgement and interlocutory decree should be deemed as benefits that had accrued to the 10th defendant-appellant.

Judge of the Court of Appeal

Kwk/-