

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

CA 423/99 (F)

DC Panadura Case No. 26/P

Henpitage Justin, No.480,
Medawala Road, Pelanwatte,
Pannipitiya.

Plaintiff-Appellant.

Vs.

1. Mahathun Atapaththu,
523/1, Galle Road, Mount
Lavinia.
2. Manager, Bank of Ceylon,
Central Office, York
Street, Colombo 1.

Defendant-Respondents.

3A. Yahampath Arachchige
Charlotte, 165, Nivanthidiya,
Piliyandala.

Substituted 3rd Defendant-

Respondent.

BEFORE : A.W.A. Salam, J.

COUNSEL : Sumedha Mahawanniarachchi for the Substituted-Plaintiff-Appellant. H. Withanachchi with Shantha Karunadhara for the 1st and 2nd Defendant-Respondents.

Upul Kumarapperuma for the 3A Defendant-Respondent.

ARGUED ON : 31.10.2011

WRITTEN SUBMISSIONS TENDERED ON: 05.03.2012

DECIDED ON : 30.04.2013

A W A Salam, J

This appeal is from the judgement dated 21st January 1999 dismissing the partition action instituted by the plaintiff-appellant (plaintiff), on the premise that the 3rd defendant-respondent (3rd defendant) had prescribed to the entire corpus. The facts briefly are that the plaintiff instituted partition action against the 1st to 3rd defendants to partition a land demarcated as lot A of KONGAHAWATTA. In his plaint the plaintiff sought a 3/10 share for him by right of purchase from one Amaradasa Ranasingha Wijayagunawardena on deed No 4754 dated 18.6.1971.

The trial commenced with 10 points of contest. The plaintiff raised 3 points of contest, the 1st and 2nd

defendants 2 and the 3rd defendant 5. No specific issue was raised by the 3rd defendant on prescription although issue No 6 which was raised was "whether the entire corpus owned by the 3rd defendant?".

At the trial the plaintiff and the substituted 3rd defendant respondent gave evidence. The learned district judge delivered judgement on 21.1.1999 dismissing the plaintiff's case holding that the 3rd defendant had prescribed to the corpus. The present appeal has been preferred against the said judgment.

On a perusal of the judgment it appears that the trial judge has failed to evaluate the evidence, in the light of the principles of law relating to prescription among co-owners and more particularly not dealt with the issue relating to ouster by overt act. As a matter of fact it is quite obvious that the learned district judge has misdirected herself on the law relating to prescription among co-owners holding incorrectly that there had been an ouster by the contesting defendant.

The appellant submits that the district judge has failed to evaluate the evidence relating to the possession of the appellant and the claim made by him that he had enjoyed the produce on the portion of land claimed by him. He further submits that the learned district judge has acted on the mere statement of the substituted 3rd defendant-respondent without a proper analysis of the evidence.

On an overall examination of the entire record it is evident that the trial judge has not looked for cogent evidence relating to prescription and not addressed her mind to the authorities dealing with the concept of prescription among co-owners. In the circumstance, I am of the view that it is totally unsafe to allow the judgment to stand. Hence, I allow the appeal and send the case back for re-trial.

There shall be no costs.

Judge of the Court of Appeal

NR/-