

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

7A/8.Wickremasinghe Mudiyansele  
Gunathilaka,  
Athuruwala, Dambadeniya

**7A and 8<sup>th</sup> Defendant-Appellants**

**C.A. NO.151/98(F)**

**D.C.KULIYAPITIYA CASE NO.6649/P**

Vs

Mannapperuma Mudiyansele  
Shantha Pushpakumara,  
C/15/, St.Sebastian Flats,  
Colombo 12.

**Substituted-Plaintiff-Respondent**

1A. Herath Mudiyansele Thilakaratne  
Bandara,  
Ihala Medagoda, Narammala

And others

**Defendant-Respondents**

**BEFORE** : **K. T. CHITRASIRI, J**

**COUNSEL** : S.Karunadhara , Attorney-at-Law for the 7A and 8<sup>th</sup>  
Defendant- Appellants

M.C.Jayarathne with Abeyrathne, Attorneys-at-Laws for the  
Substituted Plaintiff-Respondent

**ARGUED ON** : **09.05.2013**

**WRITTEN  
SUBMISSIONS  
FILED ON** : 19<sup>th</sup> June 2013 by the 7A & 8<sup>th</sup> Defendant- Respondents

**DECIDED ON** : **04. 07. 2013.**

**CHITRASIRI, J.**

This is an appeal seeking to set aside the judgment dated 19.02.1998 of the learned District Judge of Kuliyaipitiya. In that appeal, 7A and 8<sup>th</sup> Defendant-Appellants (hereinafter referred to as the defendants) have sought for a judgment in their favour claiming that they have prescribed to the land sought to be partitioned. In the petition of appeal and also in the submissions of the learned Counsel for the defendants, they have also claimed that the learned District Judge has not properly evaluated the evidence as to the prescriptive rights claimed by the 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants. In the petition of appeal, they have further stated that the Plaintiff-Respondent (hereinafter referred to as the plaintiff) has failed to establish the ownership of the original owner namely, Punchirala in order to establish the devolution of title of the land in question. Therefore, the issue before this Court is of two fold and those are namely:

- (i) **Has the plaintiff established** the ownership of Punchirala whom the plaintiff has claimed to have been the original owner to the land sought to be partitioned;
- (ii) **Have the defendants established** their claim of prescription to the corpus in terms of Section 3 of the Prescription Ordinance.

On behalf of the defendants, the 7<sup>th</sup> defendant has given evidence. He is the husband of the 3<sup>rd</sup> defendant and the father of the 8<sup>th</sup> defendant. He, in

his evidence has clearly stated that the land sought to be partitioned was owned by Ukku Menika, Bandihamy and Ran Menika. He has also accepted the position that aforesaid Ukku Menika, Ran Menika and Bandihamy were the brothers and sisters. Having said so, the 7<sup>th</sup> defendant has accepted that Punchirala was their father. This is evident by the following evidence found at pages 118 and 122 of the appeal brief.

ප්‍ර : ඒ ඉඩම ගැන තමා දන්නේ කොහොමද ?

උ : හතර දෙනෙකුට අයිතියි.

ප්‍ර : කවුද ඒ හතර දෙනා ?

උ : උක්කු මැණිකා, බන්ඩේ මැණිකා, රංමැණිකා.

උක්කු මැණිකේගේ පංගුව එච්. එම්. පුංචිරාලට වික්කා.

[page 118]

ප්‍ර : උක්කු බණ්ඩා , උක්කු මැණිකා, රම්මැණිකා, බන්ඩිහාමි යන හතරදෙනා සහෝදර සහෝදරියන්ද ?

උ : ඔව් .

ප්‍ර : ඒ හතරදෙනාගේ පියා පුංචිරාල නේද ?

උ : එච් . එම්. පුංචිරාල.

[page122]

In the circumstances, it is clear that the evidence as to the children of Punchirala referred to in the pedigree of the plaintiff and also their ownership to the land sought to be partitioned had been admitted to a greater extent by the 7<sup>th</sup> defendant himself in his evidence.

Substituted-plaintiff also has given evidence in this case. In his evidence, he has stated that Punchirala was the original owner of the land sought to be partitioned. He has further said that upon the death of Punchirala, his four children namely, Ukku Banda, Ukku Menika, Ran Menika, and Bandihamy became entitled to this land.

It must be noted that no questions or at least a suggestion were posed to the plaintiff by the defendants to ascertain whether Punchirala was not the original owner of this land though they have disputed the position of the plaintiff as to the original owner.

The next issue is in respect of the prescriptive claim made by the defendants. The 7<sup>th</sup> defendant in his evidence has stated that he entered this land during the period he married the 3<sup>rd</sup> defendant. (Vide at page 119 of the appeal brief). However, the 8<sup>th</sup> defendant who is the son of the 7<sup>th</sup> defendant has deviated from the said position and has stated that his father commenced possessing the land, even before his parents contracted their marriage. Said discrepancy in the evidence of the father and the son as to the possession of

the land also has contributed for the rejection of their evidence by the learned trial judge on the question of prescription. Moreover, it must be noted that no evidence is forthcoming other than the oral evidence of the 7<sup>th</sup> and 8<sup>th</sup> defendants to establish their prescriptive claim.

Furthermore, the position of the plaintiff had been that the 3<sup>rd</sup> defendant is entitled to a share of the land. 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants are the members of the same family. Indeed, the 3<sup>rd</sup> defendant has been allocated shares to the land even in the judgment. When they claim prescriptive rights against such a background then it becomes a claim against the other co-owners. When a claim on prescription is made by a co-owner against the other co-owners, it is necessary to establish ouster of the other co-owners from the land or something similar to an ouster. In other words it is necessary to establish an overt act by the person who claims prescription challenging the rights of the remaining co-owners. **[Corea Vs. Iseris Appuhamy 15 N L R 51, Thilakaratne Vs. Bastian 21 N L R 12, Abdul Majeed Vs. Ummu Saneera 61 N L R 36, Simon Perera Vs. Jayathunga 71 N L R 336]** In this instance, no such overt act has been established by the defendants.

This position on the question of prescription against the co-owners had been clearly considered by the learned District Judge in his judgment and it reads thus:

“3වන විත්තිකාරිය පැමිණිල්ලේ පෙලපත අනුව හවුල් අයිතිකරුවෙක් වන හෙයින් ඇය අනෙක් හවුල් අයිතිකරුවන්ට එරෙහිව කාලාවරෝධී ආඥා පනතේ 3වන වගන්තියේ ඉල්ලා ඇති කරුණු වලට අමතරව පහ කිරීමද ඔප්පු කළයුතුය. 7 සහ 8 විත්තිකරුවන් හවුල් අයිතිකරුවන් නොවන හෙයින් ඔවුන් හවුල් අයිතිකරුවන්ට විරුද්ධව දීර්ඝකාලීනව, අඛණ්ඩව, බාධා රහිතව බුක්තිය ඔප්පු කිරීම පමණක් ඇතිවේ. කෙසේ වෙතත් 7 සහ 8 වන විත්තිකරුවන් මෙම ඉඩමේ බුක්ති විදීම ආරම්භ කලේ 3 වන විත්තිකාරියගේ බුක්තිය සහ අයිතිවාසිකම උඩ බව අධිකරණයට පෙනී යයි. එසේනම් බුක්තිය සම්බන්ධව පිලිගතහැකි පැහැදිලි සාක්ෂි ඉදිරිපත් කිරීමට හැකියාව තිබෙන්නේ 3 වන විත්තිකාරියට වේ. 3වන විත්තිකාරිය මෙම නඩුවේ සාක්ෂි දී නැත. මානක නිලධාරී ඉදිරියේ වගා වලට හිමිකම ඉල්ලා සිටින 3වන විත්තිකාරිය අධිකරණයට ඒ සම්බන්ධව කරුණු ඉදිරිපත් කර නැත.”

At this stage, it must be noted that the learned District Judge having looked at the evidence as to the prescriptive claim and also the issue as to the original owner of the land sought to be partitioned had decided those two issues in favour of the plaintiff. The totality of the evidence had been considered, compared and evaluated by the learned District Judge and thereafter has decided to accept the evidence of the plaintiff as to the original owner of the land whilst rejecting the claim of prescription of the defendants.

Basically, those evidence relates to the facts of the case led before the learned trial judge. I do not see any error on the part of the Learned District Judge, he being the best person to decide as to such facts of the case, when he

decided the case in favour of the plaintiff. Hence, this Court is not inclined to interfere with his findings arrived on the facts of the case particularly when no reason is seen to show that the impugned judgment is perverse. This Court expresses such an opinion on the basis of the law pronounced in the cases of **De Silva vs. Seneviratne**, [1981 (2) S.L.R. at page 8] **Frad vs. Brown & Co**, [28 N.L.R.at page 282] **Alwis vs Piyasena Fernando** [1993 (1) S.L.R.at page 119] and **Mahavithana vs. Commissioner of Inland Revenue**. [64 N.L.R.at page 217]

For the aforesaid reasons, I am unable to decide the two issues raised in the petition of appeal and are mentioned at the outset in this judgment, in favour of the defendants. In the circumstances, I do not wish to interfere with the judgment dated 19.02.1998 of the learned District Judge.

Accordingly, this appeal is dismissed with costs.

*Appeal dismissed.*

JUDGE OF THE COURT OF APPEAL