IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

B.A.Sissie Gunawardane
1277,Rajamalwatta, Battaramulla
6th Defendant-Appellant

C.A.No.402/99 (F)
D.C.COLOMBO CASE NO.14657/P **Vs.**

S.A.Don Jercy Rosmand
Gunawardane,
22/1, Modarawila Road,
Nalluruwa, Panadura.
Deceased Plaintiff – Respondent

1a. K.K.G.Cecil Wasantha Perera,
22/1, Modarawila Road,
Nalluruwa, Panadura.
Substituted 1a
Plaintiff-Respondent
And other Defendant-Respondents

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

COUNSEL : Jagath Wickremanayake for the 6th Defendant-Appellant

Shiral Lakthilaka for the substituted Plaintiff-Respondents

Lal Matarage for the Substituted 1st and 5th Defendant- Respondents

Athula Ratnayake for the Substituted 2nd Defendant-Respondents

Niranjan de Silva for the 7th to 12th and Substituted 13th Defendant-Respondents

ARGUED ON : **20.09.2013**

WRITTEN SUBMISSIONS FILED ON :

15th October 2013 by the Substituted 2nd Defendant-Respondent

23rd October 2013 by the substituted 1st and 5th Defendant- Respondents

11th November 2013 by the Substituted Plaintiff-Respondents

13th November 2013 by the 6th Defendant-Appellant

DECIDED ON : **20.02.2014**

CHITRASIRI, J.

This is an appeal preferred by the 6th defendant-appellant (hereinafter referred to as the 6th defendant) seeking to set aside the judgment dated 19.04.1999 of the learned District Judge of Colombo. The only issue raised in the petition of appeal as well as at the argument stage is the refusal of the prescriptive claim advanced by the 6th defendant. Hence, it is first necessary to refer to the facts of this case at least briefly.

Deceased plaintiff-respondent (hereinafter referred to as the plaintiff) filed this action by her plaint dated 16.09.1987 to partition the two lands referred to in the Second and the third Schedules to the plaint. Those two lands are

situated adjacent to each other and it was possessed by the original owner as a one unit. There had been no dispute as to the land sought to be partitioned in this case.

The plaintiff in her plaint dated 16th September 1987, having set out the pedigree has narrated the way in which the rights of the parties were devolved. In that plaint, it is stated that Simithra Arachchige Don Fredrick Gunawardane was the original owner of the two lands referred to in the said 2nd and the 3rd Schedules to the plaint. Indeed, the original owner of the land sought to be partitioned was not in dispute. His title had devolved on to the plaintiff and three remaining children of the said Don Fredrick Gunawardane. 1st and the 2nd defendants and the late husband of the 6th defendant namely Don Fredrick Alfred Victor Gunawardana were the said three remaining children of the original owner Fredrick Gunawardane. 6th defendant and her children who are the 7th to 14th defendants are the second wife and her children of the late Don Fredrick Alfred Victor Gunawardana. According to the plaint, the 6th defendant becomes entitled to 1/8th share of the land whilst the balance 1/8th entitlement of her deceased husband Don Fredrick Alfred Victor Gunawardana is to devolve equally, among his eight children who are the 3rd to 5th and 7th to 14th defendant respondents. The aforesaid devolution of title had been accepted by the learned District Judge since there was no dispute as to the said devolution.

However, the 6th defendant has taken up the position that she had been in possession of this land continuously, adverse to the rights of all other respondents including the plaintiff, who were entitled to the land by inheritance. This claim of the 6th defendant was rejected by the learned District Judge. Being aggrieved by the said decision, the 6th defendant preferred this appeal challenging the refusal to accept her prescriptive claim. Therefore, as referred to above, the only issue in this case is to determine whether the learned District Judge is correct when he refused the prescriptive claim of the 6th defendant.

The fact that the 6th defendant is the second wife of one of the children of the original owner Don Fredrick Gunawardane was not in dispute. Therefore, she being a co-owner to the land by inheritance will have to establish that she possessed the land continuously for over a period of ten years, adverse to the rights of the other co-owners having those other co-owners ousted from the land sought to be partitioned.

The aforesaid position in law had been clearly established in the cases including that of:

- **Corea vs Appuhamy [15 N.L.R. at 65]**
- **Brito vs Mithunayagam [20 N.L.R. at 327]**
- **Thilakaratne vs Bastian [21 N.L.R. at 12]**
- **Gunasekera vs Thissera [(1994) 3 S.L.R. at 245]**
- **Siyathuhamy vs Podimenike [(2004) 2 S.L.R. at 323]**

In **Corea V. Iseris Appuhamy** (supra) the Privy Council having comprehensively dealt with the issue of prescription among co-owners was of the view that:

> *"Possession by a co-heir ensures to the benefit of his co-heirs.*
>
> *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 **Siyathuhamy V Podimenike** (supra) it was held thus:

> *"There cannot be prescription among co-owners unless a party is able to prove that there had been an act of ouster prior to the running of prescription."*

The authorities referred to above, show that it is the burden of the person who claims prescriptive title to a land subjected to a partition action, to establish an act of ouster or an overt act exercised by him/her ousting the other co-owners from the land to which he/she claims prescriptive rights in addition to establishing adverse and uninterrupted possession for more than ten years. Accordingly, I will now turn to consider whether the learned District Judge has properly looked at the evidence as to the claim of prescription advanced by the 6th defendant in determining her rights.

The evidence reveals that the 6th defendant married the late Don Alfred Victor Gunawardane in the year 1959. It was his second marriage. Since then

she had been living on this land with her family members. They were living in the house marked "6" shown in the preliminary plan marked "X". *(vide proceedings at page 164 in the appeal brief).* At that point of time, the plaintiff also had been living on that land. The 6th defendant herself has admitted that the 1st defendant too, until she married, was living in the ancestral house found on this land and has left the same upon her marriage in the year 1961. *(vide proceedings at page 190 in the appeal brief).* Having said so, the 6th defendant has categorically stated that she along with her children possessed this land since the year 1963 during which year the 2nd defendant's mother who was one of the children of the original owner, passed away. *(vide proceedings at page 194 in the appeal brief).* Accordingly, the 6th defendant has taken up the position that she possessed this land since the year 1963 up to the time she gave evidence without allowing the other co-owners to possess.

However, it must be noted that there is no evidence forthcoming as to an act of ouster of the other co-owners by the 6th defendant which is a requirement under the law as mentioned in the judgments referred to hereinbefore. Indeed, the learned Counsel for the 6th defendant-appellant did not advert to this aspect either in his oral submissions or in the written submissions filed on behalf of the appellant. Instead, he has referred to two decisions in which it was held that long standing and continuous possession of one co-owner without allowing the others to possess the land would presume to have established an overt act against the other co-owners. Hence, the position taken up on behalf of the 6th defendant is that it is not necessary to establish a particular overt act when

there exist adverse possession for a very long period of time as decided in the cases of **Rajapakse vs. Hendrick Singho [61 N.L.R. at 32]** and **Karunawathie vs. Gunadasa. [(1996) 2 S.L.R. at 406]**

In the case of **Rajapakse vs. Hendrick Singho (supra) Lord Kenyon C.J.** held thus:

> *"I have no hesitation in saying where the line of adverse possession begins and where it ends. Prima facie the possession of one tenant in common is that of another; every case and dictum in the books is to that effect. But you may show that one of them has been in possession and received the rents and profits to his own sole use, without account to the other, and that the other has acquiesced in this for such a length of time as may induce a jury under all the circumstances to presume an actual ouster of his companion. And there are lines of presumption ends".*

In the case of **Karunawathie v. Gunadasa, (supra)** Senanayake J with Edussuriya J. agreeing with him held thus:

> *"According to the evidence of the 4th defendant the entire produce from the coconut and other trees were enjoyed by the 4th defendant. The 4th defendant had challenged the report 'X1' and in her statement of claim and in her evidence she had claimed the entire plantation of lot '1' and lot '2'. In the instant case there was overwhelming evidence that the Defendants since the year 1955 took the produce to the exclusion of the Plaintiffs and their predecessors in title and gave them no share of the produce or paid them a share of the profits from the rubber nor any rent and did not act from which an acknowledgment of a right existing in there would fairly and naturally be inferred".* (at page 409)

"If the income that the property yields is considerable and the whole of it is appropriated by one co-owner during a long period it is a circumstance which would weigh heavily in favour of adverse possession on the part of the co-owner". (at page 411)

In the above two cases referred to by the learned Counsel for the appellant, Their Lordships have considered the circumstances under which an ouster of the other co-owners could be presumed in the absence of physical ouster. Accordingly, it is their view that such an instance would depend on the circumstances of each and every case. It was thus held by Senanayake J in Karunawathie V Gunadasa (supra) and it reads as follows;

"Each case has to be viewed on its own facts. In this case there is very clear and strong evidence of ouster the Plaintiff's own evidence was at least from 1955 the 4th Defendant-Appellant was forcefully possessing the said lots the possession was adverse and this was not a separate possession on grounds of convenience." (at page 412)

In the case of **Rajapakse vs. Hendrick Singho** (supra) there had been evidence of receiving rents and profits by the person who claimed prescriptive title without account to the other co-owners for a period of more than 31 years. Those facts were never in dispute in that case. In the case of **Karunawathie v. Gunadasa** (supra) there had been clear evidence to show that the claimant took the produce of the land exclusively. In that case, for a period of more than 23 years, no share of the produce was given or paid a share of the profits; neither

the income from the rubber plantation nor any rent for the same was paid, to the other co-owners. Those are the circumstances under which those two decisions were arrived at, in order to presume that there had been an ouster of the co-owners.

Having adverted to the facts of the two cases referred to by the learned Counsel for the appellant, I will now look at the evidence in this case to ascertain whether the 6th defendant was successful in establishing a position similar to those. Indeed, there exists overwhelming evidence to show that the 6th defendant with his children had been living on this land since the year 1963. Other co-owners were not in *de facto* possession of the land sought to be partitioned though they have visited this place for special events such as alms giving and the like. Therefore, it is to be noted that there is clear evidence to show that the 6th defendant had been in possession of the land sought to be partitioned for well over 20 years prior to the filing of the action As mentioned above, submission of the learned Counsel for the appellant is that such period of possession is capable of presuming the ouster of the respondents in this appeal. In the circumstances, it is now necessary to ascertain whether the 6th defendant could successfully claim the benefit of those authorities in establishing prescriptive rights to the land sought to be partitioned.

When looking at this issue, it is necessary to refer to the findings of the learned District Judge as well. His decision to reject the claim of prescription is

basically depended upon two events, namely an action filed by the 6th defendant in the District Court of Colombo and an attempt made in the year 1977 to have an amicable partition in respect of this land. His findings on this aspect are as follows:-

> " 6 වන විත්තිකාරියගේ සාක්ෂිය අනුව නඩු ප්‍රතිපලය ගැන ඇය කියා ඇත්තේ " නඩුකාර හාමුදුරුවෝ නඩුව විසි කලා. අයිතියක් තියෙනවා නම් බෙදුම් නඩුවක් දා ගන්න කිව්වා " යනුවෙනි. මෙම වාචික සාක්ෂියෙන් පෙනී යන්නේ ප්‍රශ්නගත එම නඩුව පැහැදිලිව බෙදුම් නඩුවක් නොවන බවයි. නඩුව පැවරීමට හේතුව වශයෙන් ඇය කියා ඇත්තේ නඩුව පැවරුවේ "මහගෙට එන්න" යනුවෙනි. එහෙත් හැබෑවට මෙම දේපල ඇති හොයක් සම්බන්ධව පවරන ලද නඩුවකි. වත්මන් නඩුව හොයක් සම්බන්ධව නොව සම්පූර්ණ ඉඩම බෙදා වෙන් කිරීම සම්බන්ධයෙනි.
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> පැමිණිලි පක්ෂය හා 1, 2 විත්තිකරුවන් නඩුවට අදාල දේපල සමාදානයෙන් වෙන් කර ගැනීමට උත්සාහ කල බවත් එයට පැමිණිල්ලේ නඩුව තරග කරන විත්තිකරුවන් ඉඩ නොදුන් බවත් මෙම සිද්ධියද පිටමන් කිරීමේ ක්‍රියාවක් බවත් තරග කරන විත්තිකරුවන් ප්‍රකාශ කර ඇත.
>
> සාමදානයෙන් ඉඩම වෙන් කර ගැනීමට උත්සාහ දරා ඇත්තේ පැමිණිලි පක්ෂයේ මූලිකත්වයෙනි. මෙම උත්සාහය 1977 වසරේ දරන ලද්දක් බව 6 විත්තිකාරිය සඳහන් කරන්නේ එය ඇතිවූ වශයෙන්ම සිදු වී ඇත්තේ 1972 වසරේ පමණය.
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> 6 විත්තිකාරියගේ සාක්ෂිය මෙම "සාමදානයෙන් බෙදා ගැනීමේ උත්සාහය" සම්බන්ධයෙන් සලකා බැලීමෙදී පෙනී යන්නේ ඒ විත්තිකාරියද එක් අවස්ථාවකදී එයට විරුද්ධ වී නොමැති බවයි."

The aforesaid findings of the learned District Judge show that the 6th defendant had acted, accepting the rights of the other co-owners on those two instances. The 6th defendant in her evidence also has stated that an action was filed against her husband in the year 1960 by the mother of the 2nd defendant and that action was dismissed in the year 1963. *(vide proceedings at pages 193 & 194 in the appeal brief).*

The evidence of the 6th defendant in connection with the incident that took place in order to have an amicable partition amongst the other co-owners in the year 1977 is as follows:

ප්‍ර ඃ ඔබතුමාට මෙහෙදී යම්කිසි කාලයක මේ ඉඩම බෙදා ගන්න සාකච්ඡාවක් තිබුණාද?

උ ඃ ඔව්.

ප්‍ර ඃ ඉඩම කා සතර බෙදා ගන්නද සාකච්ඡාවක් තිබුණේ?

උ ඃ අපිටත්, ඒ නොදැන්නත්. මේ නඩුවේ පාර්ශවිකයන්ගෙන් ඉස්සෙල්ලා ඉඩම බෙදා ගන්න.

ප්‍ර ඃ ඒ සාකච්ඡාව තිබුණේ කොයි කාලයේද?

උ ඃ 1977 දී.

ප්‍ර ඃ කොළඹ ඔබතුමා?

උ ඃ ඔව්. 1977 දී.

ප්‍ර ඃ ඒ සාකච්ඡාවෙන් පස්සෙ මොකද වුණේ?

උ ඃ ඒ ගොයිබෑවා නිලධාරීන් මහත්තයෙක් අරන් ආවා.

The aforesaid evidence shows that the 6th defendant in the year 1977 had a discussion to partition the land amicably between the co-owners. Even though there is evidence to show that the said attempt to have an amicable partition was a failure, the fact remains that the 6th defendant had participated in the discussions to have an amicable partition. Such an attitude of the 6th defendant shows that she was acting, having accepted the rights of the other co-owners to the land during the year 1977. Such an acceptance of the rights of the other co-owners, stand in the way to establish the prescriptive claim she made since it will cut across the adversity which is a pre requisite when claiming prescription.

Therefore on one hand, the circumstances present in this case will become a bar to prove undisturbed and uninterrupted possession of the 6th defendant and on the other hand, the attempt to have an amicable settlement would prevent the 6th defendant claiming the benefit of the law referred to in those two decisions namely **Rajapakse vs. Hendrick Singho and Karunawathie v. Gunadasa** (supra) To my mind, those decisions are applicable, only after having established, not only exclusive and undisturbed physical possession for over very long period of time but also by proving that the claimant had acted without conceding the rights of the co-owners.

The facts of this case do not show such a position had prevailed in this instance. Therefore, I am not inclined to presume ouster as decided in the two decisions referred to by the learned Counsel for the appellant though the 6th

defendant had established her longstanding possession which ran for a period more than twenty years. Hence, the 6th defendant will not become entitled to have the benefit of the law pronounced in those two cases namely **Rajapakse vs. Hendrick Singho** and **Karunawathie v. Gunadasa**. (supra) Accordingly, it is my considered opinion that the 6th defendant's prescriptive claim should fail as concluded by the learned District Judge.

One other matter I wish to mention is that even though the 6th defendant has claimed prescriptive title only to herself, she in her evidence-in-chief has clearly stated that 10th and the 12th defendant-respondents are also living in two houses found on the land sought to be partitioned. (*vide proceedings at page 200 in the appeal brief*) These two parties have not filed an appeal challenging the judgment. In the event the prescriptive claim of the 6th defendant is upheld, it will negate the rights of those parties as well though they are the children of the 6th defendant-appellant, particularly because they are also to become entitled to a share of the land in terms of the decree to be entered in terms of the judgment delivered in this case.

Accordingly, I am not inclined to interfere with the decision of the learned District Judge. For the aforesaid reasons, this appeal is dismissed. Having considered the circumstances of this case, I do not wish to make an order as to the costs of this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL