

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

Hiniduma Liyanage Nandawathie

of Mabotuwana Road,

Wanduramba.

**Plaintiff**

**C A Case No. 786/97 (F)**

**Vs**

**D C Galle Cse No.10092/P**

1. Samarasinghe Vidanagama

Ariyasena of Mabotuwana Road,

Wanduramba.

2. Piyadasa Sooriarachchi of

“Samanpaya”,

No.48, Wewelwala Road,

Kitulampitiya, Galle.

3. Mallaperuma Tantrige

Ananda of Polkanatta,

Wanduramba.

4. N.T.S. Wijesekara of Imbulanagoda

Kanatta, Wanduramba.

**Defendants**

**Now between**

Hiniduma Liyanage Nandawathie

of Mabotuwana Road,

Wanduramba.

**Plaintiff Appellant**

**Vs.**

1. Samarasinghe Vidanagama

Ariyasena of Mabotuwana Road,

Wanduramba.

2. Piyadasa Sooriarachchi of

“Samanpaya”,

No.48, Wewelwala Road,

Kitulampitiya, Galle.

3. Mallaperuma Tantrige

Ananda of Polkanatta,

Wanduramba.

4. N.T.S. Wijesekara of Imbulanagoda

Kanatta, Wanduramba.

**Defendants Respondents**

**BEFORE**

: **P.W.D.C. JAYATHILAKE, J**

**COUNSEL**

: Rohan Sahabandu PC with

Diloka Perera for the Plaintiff

Appellant.

W.P.L.D. Weerawardena for the

Defendant Respondent.

**ARGUED ON** : 03.07.2014

**DECIDED ON** : 12.06.2015

**P.W.D.C. Jayathilake, J**

This is a partition action filed seeking to terminate the co-ownership of the Plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The learned District Judge in her judgment dated 12.08.1997 has stated that the Plaintiff has proved the Plaintiff's pedigree by submitting marked documents P1 to P15. But at the conclusion the trial judge has dismissed the Plaintiff's case and declared that the 1<sup>st</sup> Defendant had acquired the prescriptive title to the entire land. This is an appeal filed by the Plaintiff Appellant against the said judgment moving for setting aside the judgment of the District Court and to decide the case in favour of the Plaintiff.

The subject matter of the case is the land called Pitiduwa Kumbura situated at Waduramba in extent of ten Kurunies paddy sowing. The contest of the trial was between the Plaintiff and the 1<sup>st</sup> Defendant. The main issue was whether the undivided rights of the parties to the land in question should be divided as per the pedigree shown in the plaint or whether the 1<sup>st</sup> Defendant's predecessor had acquired prescriptive title to the land. The Plaintiff's position was that the original owner of the corpus was David Dias Abeygunawardana. His title devolved to his wife and seven children. The said widow alienated her undivided half share to the said seven children and thereby seven children became entitled to 1/7 share each. Out of them two children died issueless and then remaining five children became entitled by inheritance to 1/5 share each from the corpus.

The Plaintiff has shown the devolution of title in his pedigree as per the deeds attested subsequent to the said inheritance. The Plaintiff has become entitled to undivided 5050/7200 shares the 1<sup>st</sup> Defendant 1825/7200 shares and also the 2<sup>nd</sup> Defendant 225/7200 shares.

The 1<sup>st</sup> Defendant in his statement of claim dated 06.09.1990 has accepted the pedigree of the Plaintiff and the undivided shares shown to him in the plaint. However he has moved that the tenant cultivator namely Samarasinghe Vidhana Gamage Akmon who was occupying the entire land be made a party.

Accordingly said Akmon has been added as the 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant filed a statement of claim taking up the position that one Hector Emmanuel Dias Abeygunawardana was the owner of the entire land and that the 4<sup>th</sup> Defendant was his tenant cultivator from 08.01.1963. The position he has taken was that Hector Emmanuel Dias transferred the land to one Hector Bernard Dias in 1969 and said Hector Bernard transferred the land to the 1<sup>st</sup> Defendant in 1984. The 1<sup>st</sup> Defendant transferred the land to one Peiris in 1985 and got it re-transferred in his name in 1986. The 1<sup>st</sup> Defendant has filed an amended statement of claim along with the 4<sup>th</sup> Defendant. In his amended statement he took up the position that he had possessed the land exclusively through his tenant cultivator as the land had been occupied by the tenant cultivator the 4<sup>th</sup> Defendant.

Accordingly the main issue of the case had been whether Hector Emmanuel had become sole owner of the subject matter by prescription. The 2<sup>nd</sup> Defendant has given evidence for the Plaintiff's case and marked notary deeds disclosed in the Plaintiff's pedigree. He has admitted that Hector had given the entire subject matter on a lease which was marked as 1 V 1 to Ovinis and Uraneris and he has stated that he himself had got a lease from Hector after the expiration of said lease. While denying the 4<sup>th</sup> Defendant as the tenant

cultivator he took up the position that the 4<sup>th</sup> defendant was only the farmer who cultivated under him.

Admittedly the 4<sup>th</sup> Defendant is the farmer who cultivated the subject matter from 1963. According to him he took over cultivation of the paddy field from Hector Dias Abeygunawardhana. He gave paddy as the rent to said Hector Dias. The 4<sup>th</sup> Defendant has testified that Piyadasa Sooriyaarachchi who gave evidence for the Plaintiff's case had never possessed this land. As he knew that nobody else had possessed this land except Hector Dias he recommended his son the 1<sup>st</sup> Defendant to buy it.

The learned trial judge has come to the conclusion that according to the evidence revealed Hector Dias had possessed this land not as a co-owner but the sole owner. Therefore he has acquired the prescriptive rights to the land and those rights had been devolved on the 1<sup>st</sup> Defendant.

The learned President's Counsel for the Plaintiff Appellant made the following submissions.

The Plaintiff's position was that the land was owned by David Dias and his rights were devolved to the parties as shown in the pedigree. The claim of the 1<sup>st</sup> Defendant was that the land was possessed solely by Hector Emmanuel who transferred to his son Hector Bernard from whom the 1<sup>st</sup> Defendant

obtained the title. But on the pedigree pleaded by the Plaintiff, Hector Emmanuel was one of the children of David Dias. The President's Counsel submits that Hector Bernard has transferred to the 1<sup>st</sup> Defendant what he got from Hector Bernard in deed No. 345 which is marked as P3. Accordingly the Plaintiff's position is what has been transferred was the share that Hector Emmanuel owned according to the pedigree. He further submits as Hector Emmanuel had been a co-owner, the mere statement of the 4<sup>th</sup> Defendant of saying that he gave pravani to Hector Emmanuel does not prove prescriptive position. The learned District Judge has not examined the position of capacity in which Hector Emmanuel possessed the land through the 4<sup>th</sup> Defendant, submits the learned counsel. Was it on the basis of being a co-owner or, collecting rent on behalf of others, is a question that was not even addressed by the learned District Judge he argues.

"Adverse possession means a possession unaccompanied by payment of rent or produce or performance of service or duty or by any other act by the possessor from which an acknowledgement of a right existing in another person would fairly and naturally be inferred. This principle similarly applies to one co-owner's prescription against all other co-owners in the context of co-ownership" argues the learned counsel for the respondent by citing



Thilakarathna Vs Bastian Case<sup>1</sup>. Learned counsel emphasized three principles of law applied to interpret the word "Adverse" by Bertrem J in the said case.

1. Every co-owner has a right to possess and enjoy the whole property and every part of it, the possession of one co-owner in that capacity is in law the possession of all.
2. Where the circumstances are such that a man's possession may be referable either to an unlawful act or to a lawful title, he is presumed to possess by virtue of the lawful title.
3. A person who has entered into a possession of land in one capacity, it presumed to continue to possess it in the same capacity.

The possession in this present case did not confine to a mere word as there were so many documentary proofs to prove 1<sup>st</sup> Defendant's prescriptive title, submits the learned counsel. The documents mentioned by the learned counsel for the respondent are 1 V 1 to 1 V 3 which are lease agreements. These lease agreements are evidence to the fact that Hector Emmanuel has given the subject matter on lease to farmers who cultivated from 1945. The document V 4 is the agro identity card of 4<sup>th</sup> Defendant which shows that the

4<sup>th</sup> Defendant had been the tenant cultivator, and H.A.D. Abeygunawardhana had been the owner of the subject matter.

As stated earlier Hector Emmanuel was a co-owner by inheritance. Therefore he had to acquire the prescriptive title in order to become the sole owner. The position how a co-owner can acquire the prescriptive title has been discussed in a series of judgments. It is mentioned earlier that three principles laid down in *Corea Vs Appuhami*<sup>2</sup> applicable in interpreting the word adverse. A necessity of a special sort of adverse position has been discussed in *Aodiris Vs Mendis*<sup>3</sup>, *William Singho Appuhamy Vs Ran Naide*<sup>4</sup>. It has been held in *Juliyana Hamine Vs Don Thomas*<sup>5</sup> that when a witness giving evidence of prospective states "I possessed" or "We possessed" the court shouldn't insist on those words being explained and exemplified. De Silva J in *Abdul Majeed Vs Umma Zaneera*<sup>6</sup> has taken up the view that long continued possession along the property owned in common is not sufficient to draw an assumption of ouster. It is relevant to consider the matters such as

- a) Income divided from the property.
- b) The value of the property.
- c) The relationship of the co-owners and where they reside in relation to the situation of the property.

d) Document executed on the basis of exclusive ownership.

In the instant case long continued possession of Hector Emmanuel is evident by the lease agreements entered by him with different farmers at several times. It appears that in those deeds Hector Emmanuel has acted as the exclusive owner. There is no explanation in the Plaintiff's case in regard to the execution of those deeds by Hector Emmanuel on the basis of exclusive ownership. The only questionable point is the filing of the 1<sup>st</sup> Defendant's original statement of claim accepting his undivided share shown by the Plaintiff. But how it had happened has not been disclosed as the Plaintiff has not taken any interest to call the 1<sup>st</sup> Defendant to get that matter clarified. In the circumstance as the documentary evidence has become cogent evidence in favour of the 1<sup>st</sup> Defendant to claim the devolution of prescriptive title of Hector Emmanuel. **When there is documentary evidence that one co-owner has possessed the whole land acting as the sole owner and claim prescriptive title, other co-owners claiming co-ownership shall have an acceptable explanation sufficient to rebut the irresistible inference of adverse possession.**

I am of the view that the trial court, has no alternative other than accepting the fact that long continued possession of Hector Emmanuel was in the nature

of adverse possession which had resulted to terminate the co-ownership by way of prescription. I therefore see no reason to interfere with the judgment of the District Judge and as such dismiss the appeal.

*Appeal dismissed.*

**JUDGE OF THE COURT OF APPEAL**

1. *(21 NLR 12)*
2. *(15 NLR 65)*
3. *(13 NLR 309)*
4. *(1 CWR 92)*
5. *(59 NLR 546)*
6. *(61 NLR 361)*