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

In the matter of an appeal under Section 754(1) of the Civil Procedure Code.

CA No. 1205 / 2000 (F)

DC Walasmulla No. 556 / P

Liyanarachchige Heenhamy (Deceased),

Dampahalagewatta,

Ittademaliya,

Walasmulla.

Original 1st Defendant - Appellant

1. **Geegana Gamage Kusumawathie,**

   'Nilmini',

   Galahitiya,

   Walasmulla.

2. **Geegana Gamage Carolis,**

   Damapahalagewatta,

   Ittademaliya,

   Walasmulla.

3. **Geegana Gamage Juwanis,**

   Dambakandawala,

   Galahitiya,

   Walasmulla.

4. **Geegana Gamage Karunawathie,**

Government Farm,

Ridiyagama,

Ambalantota.

Substituted 1st Defendant - Appellants

-Vs-

Jasin Arachchige Karunawathie,

Galwadiyawatta,

Ittademaliya,

Walasmulla.

Plaintiff - Respondent

Munasinghe Arachchige Malhamy,

Gambaragedara,

Ittademaliya,

Walasnulla.

2nd Defendant - Respondent

Kankanam Pathiranage Nicholas,

Mahagodewatta,

Ittademaliya,

Walasmulla.

3rd Defendant - Respondent

BEFORE	:	**A.H.M.D. Nawaz, J.**
COUNSEL	:	Shantha Karunadhara for the substituted 1st Defendant- Appellants. N.T.S. Kularatne with M.E.T. Tilakaratne for 2nd and 3rd Defendant-Respondents.
Argued on	:	07.07.2015
Written Submissions On	:	26.10.2015
Decided on	:	20.10.2016

A.H.M.D. NAWAZ, J.

The Plaintiff instituted this action in the District Court of Walasmulla for the partitioning of a land called "Rotumbage Amabgahawatta" situated in Ittademiliya and containing in extent 2 acres which is morefully described in the schedule to the plaint. Thereafter a commission was issued to B.G. Karunadasa, Licensed Surveyor, whose Preliminary Plan No. 847 dated 17.12.1993 and his report have since been filed in the case marked X and X1 respectively. The Plaintiff sought to partition the said land among herself (5/16), the 1st Defendant (4/16) and the 2nd Defendant, (3/16)–the fractions denoting the shares.

The original 1st Defendant Liyanarachchige Heenhamy, (hereinafter sometimes referred to as "the 1st Defendant") who is now deceased, filed her statement of claim admitting all the averments in the plaint excepting the averments in paragraph 12 which set out the Plaintiff's share allotment and devolution of rights as stated above. The said Heenhamy stated in her statement of claim that "as pleaded in paragraph 4 of the plaint, she succeeded to 1/4th share of her father Liyana Arachchige Don Nicholas and the entire 1/4th share of Liyana Arachchige

Kirihamy - the only sister of her father who died issueless and upon her death, devolved on her - the 1st Defendant-vide the points of contest raised by the original 1st Defendant raised at the trial. Accordingly, the 1st Defendant Heenhamy became entitled to ½ share of the said land. She further stated that she along with her husband had possessed the said portion for over 60 years while carrying on with the plantations thereon such as coconut, jack and breadfruit.

The 2nd Defendant in her statement of claim claimed Lot 2 (also known as Lot B) depicted in the said Plan No. 847 together with plantation and building standing thereon. It is to be noted that the said land to be partitioned is depicted as Lot A and Lot B in the said Plan No. 847.

The 3rd Defendant pleaded that his father Kanganam Pathiranage Samel was entitled to ½ share of the said land and was in possession of the said portion which is depicted as Lot A on the Northern side of the corpus. The said Samel built a house on the said portion and was living there and he, by Deed No. 3620 dated 05.11.1943 (3V1), had gifted the said portion to the 3rd Defendant and his sister and the 3rd Defendant stated that he had been possessing the said share (Lot A) after his father's death.

The trial commenced on 30 points of contest, Nos. 1 to 15 raised by the Plaintiff, Nos. 16 to 21 by the 1st Defendant, Nos. 22 and 23 by the 2nd Defendant and No. 24 to 30 by the 3rd Defendant. The Plaintiff testified as to the devolution of title and marked two deeds (P1 and P2) along with the said Plan No. 847 and report which were marked as X and X1.

One Deegana Gamage Carolis was summoned to give evidence on behalf of the 1st Defendant - the Appellant in the instant appeal, who claimed title to ½ share of the corpus.

As stated before, the 2nd Defendant stated in her evidence that she had been possessing Lot 2 for over 30 years which position has been admitted by the Plaintiff in her evidence.

On behalf of the 3rd Defendant his son Kankanam Pathiranage Jinadasa gave evidence and adverted to the fact that his father is entitled to Lot A upon long possession and by virtue of Deed No. 3620 marked 3V1 his father had also become the owner of Lot A. In the circumstances he claimed that Lot A must be excluded from the corpus. So the case of the 3rd Defendant was that Lot A must be excluded from the corpus.

At the conclusion of the trial, the learned District Judge delivered his judgment on 22.11.2000 allowing the partition of the said land in the following manner:

> *Lot A in the said Plan No. 847 must be allotted to the 3rd defendant and Lot B must be allotted among the plaintiff and the 1st and 2nd defendants in the proportion of Plaintiff to get 5/16, 1st defendant 1/2 (or 8/16) and 2nd defendant to 3/16 shares respectively.*

So Lot A went to the 3rd Defendant as his plea had been one for exclusion of Lot A, whilst it was Lot B that was partitioned among the Plaintiff, 1st Defendant and 2nd Defendant.

Amongst the parties only the 1st Defendant has preferred this appeal but I must observe that grounds of appeal are tenuous. It has to be noted that issues Nos. 16 to 21 raised by the 1st Defendant have been answered by the learned District Judge in his favour and in the way he claimed he must be allotted ½ share of the land, he did secure half a share but that half share came from Lot B. Lot A, as I stated, was excluded in favour of the 3rd Defendant. It would appear that the 1st Defendant has no grounds whatsoever to urge in this appeal against the judgment of the learned

District Judge of Walasmulla. In other words, there is no merit in this appeal for the reasons I set out below.

The only question that arises in this appeal is whether the 1st Defendant's claim for ½ share of the land should be out of the whole land or out of Lot B. On the strength of the oral evidence given on behalf of the 3rd Defendant, by Kankanam Pathiranage Jinadasa, the son of the 3rd Defendant, which has been fortified by documentary evidence marked 3V1 (Deed No. 3620), the learned District Judge has come to the conclusion that *"it is clear that the 3rd defendant and his predecessors in title have possessed the said Lot A in Plan No. 847 (Plan X) over 10 years independently and uninterruptedly and therefore it has to be decided that the 3rd defendant should be entitled to Lot A and the house and plantations standing thereon, and after excluding Lot A from the corpus, the remaining Lot B should be divided among the other parties to the case"*. The learned Judge has come to this conclusion after having analyzed the evidence led in this case and the pedigree of the Plaintiff filed in the case. On analysis this finding is impregnable.

If a co-owner has possessed a portion of the land adversely for over thirty or forty years as in the case of the 3rd Defendant, he can claim prescriptive title to that separate portion. In this case it is established to the satisfaction of Court that the 3rd Defendant has possessed Lot A to the exclusion of others. The 3rd Defendant's exclusive possession has been admitted by the Plaintiff and the son of the Appellant in their evidence. Their evidence is supported by the Grama Sevaka Niladhari -(*see* pages 89 and 90 of the Appeal Brief). I also advert to prescription among co-owners later on in the judgment. On the reasoning too, the exclusion of Lot A from the corpus, based on long and prescriptive possession, is explicable.

It is well established that the findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed -*see* the observations of G.P.S. de

Silva C.J in ***Alwis v. Piyasena Fernando***[1]. I am therefore of the view that the finding of the learned District Judge that the 3rd Defendant is entitled to Lot A cannot be disturbed.

After excluding the said Lot A from the corpus, the balance portion left for partition is only Lot B which has been allotted to the Plaintiff and the 1st and 2nd Defendants in terms of the shares claimed by them. Accordingly, the 1st Defendant secured a reduced extent which is supportable having regard to the evidence led in the case. The 1st Defendant has failed to establish his rights to a larger land which would include Lot A. As against the evidence of 3rd Defendant's son and the Grama Sevaka led on behalf of the 3rd Defendant that he has been in possession of Lot A as a separate portion enclosed by a fence, I find that no evidence has been led to contradict the unassailable evidence. This clearly establishes the fact that the 3rd Defendant has been adversely possessing Lot A independently and uninterruptedly which the 1st Defendant or other parties have failed to disprove. This position is very clear from the evidence led in the case. The 1st Defendant has not led any evidence to include Lot A along with Lot B and thus the view of the learned District Judge that the whole of the corpus comprising Lot A and Lot B cannot be the subject matter for partition is beyond reproach.

The fact that Lot A should not have been excluded has not been raised by the 1st Defendant-Appellant in her petition of appeal. It is apparent that the 1st Defendant-Appellant has not given any reason why she is aggrieved by the judgment entered in this case by the trial Judge either factually or in law. The only reason that has been urged for the appeal is that evidence proffered by parties has not been analyzed. I take the view that there has been a proper investigation of title on the part of the learned District Judge.

[1] (1993) (1) Sri.L.R 119.

Section 754(1) of the Civil Procedure Code states:

> *"Any person who shall be dissatisfied with any judgment, pronounced by any original Court in any civil action, proceeding or matter to which he is a party, may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law".*

In this regard it must be mentioned that none of the issues raised by the 1st Defendant-Appellant has been answered against her. All that she claimed has been granted by the judgment but of course half a share has been allotted to her only in Lot B as I said before, an entitlement stretching beyond Lot B into Lot A has not proved by the 1st Defendant-Appellant. On the contrary, the 3rd Defendant established by cogent and compelling evidence her prescriptive right to Lot A. Undoubtedly in ***Sirajudeen v. Abbas*[2],** His Lordship the Chief Justice, G.P.S. de Silva J held that one who claims prescriptive title must establish a starting point for his or her acquisition of prescriptive rights.

However, it has also been held that the proof of the realities existing over a sustained period of time may give rise, in appropriate circumstances, to the inference that the quality of possession has been altered. In other words, the courts have presumed an ouster when exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time, in the distant past, there was, in fact, a denial of the rights of the other co-owners. There must be proved circumstances which tend to show, first, the probability of an ouster and, secondly, the difficulty or impossibility of adducing proof of an identifiable event which triggered the threshold of adverse possession.

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[2] (1994) 2 Sri.LR 365

It must be pointed out, however, that this presumption would not be readily resorted to in the absence of very compelling evidence, sufficient to convince the judge that possession must have become adverse at some time in the past. In fact it is only in a situation where it would be unreasonable and artificial for a court to believe that the character of a co-owner's possession had not undergone a change that this presumption would be relied on. There is unassailable evidence led on behalf of the 3rd Defendant that establishes adverse possession.

In the circumstances I am of the view that the learned District judge has investigated the title of the parties correctly on the documents and oral evidence led in this case and he came to the conclusion that the parties are entitled to the respective shares as determined by him in his judgment. I do not find any error in his findings of fact and as such I cannot find any error in law as well.

For the reasons set out above, I conclude that the 1st Defendant-Appellant has no grounds to urge that merit a reversal of the judgment dated 22nd November 2000 and I proceed to affirm the judgment of the Learned District Judge of Walasmulla. The appeal is accordingly dismissed with costs.

JUDGE OF THE COURT OF APPEAL