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

Karunamuni Karunasiri de Silva.

Kuda Waskaduwa, Waskaduwa,

3rd Defendant-Appellant

C.A.Appeal No.723/99(F)

D.C.Kalutara No.P/6657

Vs.

O1A Philomina Wimala de Zoysa

Benlowmen State Kirindiella

Bandarawela.

01B. Vaesar Tyrano De Zoysa of
2B Official iresidence, Survey
Department , Diyathalawa.

01.C Indira Kumari de Zoysa of

JerusalemGate,Benlowmen
State, Kirindiella

Bandarawela

01. D Sandra Eresha de Zoysa of

28/B,1stlane,Borelasgamuwa.

01D Marlen Condret De Zoysa
247, Diyagalawatta, Jalthara
Ranala.

01.F Asoka Osmond De Zoysa
Kahakumaravila Walawwa,
Ahalapola , Pallepola.

SubstitutedPlaintiff-Respondents.

Before : M.M.A.Gaffoor,J. and
Deepali Wijesundra,J.

Counsel : Niranjan de Silva for the 3rd Defendant-Appellant

Sanjeewa Dasanayake for the 2nd Defendant-Respondent.

Kapila Sooriyarachchi with Dilini Wijesekara for the Plaintiff-Respondent.

Argued on : 23/11/2015

Decided on : 05/12/2016

M.M.A.Gaffoor,J.

The plaintiff-Respondent (the Plaintiff) instituted a partition action for the partition of the land called KETAKELAGAHAWATTA". The case was taken up for trial on 8 issues and first issue was settled between the Plaintiff and 2nd Defendant during the course of the trial. The learned District Judge has delivered his judgment on 1999/08/24 in favour of the plaintiff respondent. Being aggrieved by the said judgment the defendant appellant preferred this appeal.

There are three main disputes should be analyzed in this case. They are:

i) Whether the appeal is time barred according to the preliminary application.

ii) Whether the Learned District Judge failed to identify corpus.

iii) Whether the learned District Judge erred in holding that the appellant has not proved prescriptive title to the corpus.

i.Appeal is time barred.

According to the Section 755 (3) of the Civil Procedure Code "Every appellant shall within sixty days from the date of the judgment or decree appealed against present to the original Court, a petition of appeal setting out of the circumstances out of which the appeal arises and the grounds of objection to the judgment of decree appealed against the containing the particulars required by Section 758 which shall be signed by the appellant or his Registered – Attorney. Such petition of appeal shall be except from stamp duty. Provided that if such petition is not presented to the original court within sixty days from the date of the judgment or decree appealed against the court shall refuse to receive the appeal". In this matter the specific date the impugned judgment was delivered is not stated on the face judgment but it was delivered in open court on 24/08/1999 according to the journal entry.

In ***Peter Singo V. Costa 1992 1 SLR pg.49*** state through the lordships of Ananda kumaraswamy,J. and Gunasekara J " in

computing time limits for filing the notice of appeal and petition of appeal only the date on which the judgment was pronounced can be excluded". Therefore here appellant should filed his petition of appeal on or before 23/10/2016 excluding judgment day. Since the present petition of appeal had been filed on 25/10/1999 on its 62nd day contended that it had been filed out of time. But 60th and 61st days happened to be Saturday and Sunday which are no working days.

Computation of time.

(1) Where a limit time from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, and the last day of the limited time is a day on which the court or office is closed, then the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day thereafter on which the court or office is open.

(2) where by any written law any act or proceeding is directed or allowed to be done or taken in a court or office on a certain day, then if the court or office is closed on that day the act or proceeding shall be considered as done or taken in due time if it

is done or taken on the next day thereafter on which the court or office is open.

Natchiya V.Marikkar SLR-1982 Volume 2 page No.714

Sharvananda,J.

The question that is involved in this appeal is whether saturdays should be excluded or included in computing the fourteen days prescribed by Section 756(4) of the Civil Procedure Code for the application for Leave to Appeal to be presented to the Court of Appeal. This sub-section provides that "the application for Leave to Appeal shall be presented to Supreme Court for his purpose by the party appellant or his Registered Attorney within a period of fourteen days from the date when the order appealed against was pronounced exclusive of the date of that date itself and of the day when the application is presented and of Sundays and public holidays". Article 169 (2) of the Constitution provides that every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal. Counsel for the appellant conceded that if saturdays are not excluded , the preliminary objection raised by Counsel for respondent , that the

application has been filed out of time should succeed. The Court of Appeal has upheld the objection and hence this appeal by the appellant has upheld the objection and hence this appeal by the appellant.

The appellant citing the judgment in ***Jinadasa Vs. Hemamali and others 2006 2 SLR Pg.300.*** " the law cannot expect the performance of what is impossible and when the law had given a party a limited time to be perform a certain cat he should be given the full benefit of that period as in this case where it was not possible for the party having a period of Sixty days to file the petition of appeal on the 60th day as the 60th and 61st days happened to be Saturday and Sunday.

Therefore I am of the view that the petition of Appeal filed on next working day was within the period as provided for in Section 755 (3). In this circumstance, petition of the appeal of the appellant is within time and the preliminary objection raised by the respondent is rejected without costs.

ii) Identification of the Corpus

In a partition action there is a duty cast on the District Judge to ascertain the identity of the corpus sought to be partitioned and to investigate the title of each party before allotting shares, irrespective of what the parties may or may not.

The boundaries of the corpus identified by the Surveyor K.D.L.Wijenayake in Preliminary Plan No.871 dated 11/07/1997 and the boundaries of the land sought to be partitioned by the plaintiff according to the schedule to the plaint are as same. But the issue arose in the extent of the corpus should be partitioned. According to the plaint of the corpus has an extent of 1 Acre and 1 Rood when the surveyor goes to identify the property to portioned and draw up the preliminary plan found out that the property to be partitioned is only 1 Rood and 1.8 Perches.

However , defendant had right to challenged the extent during the trial but no parties challenged and accepted the Preliminary Plan No.871 dated 11/07/1997 made by the Surveyor K.D.I. Wijenayake in their admission record dated in 1998/07/13 .

Therefore the learned District Jude clearly find out the corpus is to be partitioned.

iii) <u>The learned District Judge erred in holding that the appellant has not proved prescriptive title on the corpus.</u>

Counsel for the appellant stated that the appellant have clearly proved their prescriptive title allegedly acquired by their ultimate predecessors in title and the learned District Judge has erred in holding that the appellants have not proved prescriptive title to the corpus and have proved the title of Georgie Silva, how he is entitled to 1/8 share. He further stated that learned District Judge failed further stated that the Learned District Judge failed to consider the analyze the aforementioned facts and the legal position clearly established by the defendant appellant.

The Learned Counsel for the Plaintiff-Respondent stated that the learned District Judge had come to a correct finding considering the evidence led before him and also considering the documents marked and that the appeal should be dismissed with costs.

The 3rd Defendant – Appellant failed to produce or explain how Geogie Silva was entitled to 1/8 share except for the fact that it is stated in the statement of claim of the 3rd Defendant-Appellant that to be prescriptive possession. Hingappu and Georgie Silva became entitle to ¼ share. And also 3rd Defendant –Appellant came the possession in a part of the corpus, that the admitted fact that Baby Nona who is 3rd Defendant- Appellant Grandmother (1st Defendant) had been inoccupation of a portion of the land for long time. And Baby Nona and 4th Defendant (father of the 3rd Defendant transferred their rights to 2nd Defendant-Respondent . In these circumstance 3rd Defendant –Appellant failed to prove his prescriptive title allegedly acquired by his ultimate predecessors.

Further the appellant build and came into occupation of the house "B" in 1998 or 1989 as stated and document "3V1" executed in 1988/04/01 by him still he could not have claim on presxcriptive possession either.

In the case of ***Mithrapala and Others Vs. Ikonis Singho (2005) 1SLR 206,*** held that where the party invokes the provisions

of Section 3 of the prescription Ordinance in order to defeat the ownership of the adverse claimant to immovable property the burden of proof rests squarely and fairly on him to establish a starting point for his or acquisition of prescriptive title.

In this circumstances, for the reasons of the aforesaid, appeal is dismissed without costs.

JUDGE OF THE COURT OF APPEAL.

Deepali Wijesundara,J.

I agree.

JUDGE OF THE COURT OF APPEAL.