

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

Gamaralage Kiri Banda

Batuwatta

Plaintiff-Appellant

C.A.No.05/99 (F)

D.C.Kegalle 23447/P

-Vs-

1. Gamaralalage Mudiyanse,
Galigamuwa Twon.
2. Emage Nona,
Galigamuwa Town.
3. Godabehepudoge Chisthitha,
Galigamuwa Town. (Deceased)
- 3A. P. R. Manga,
Galigamuwa Town.
4. Godabehepudoge Pema,
Galigamuwa, Town.(Deceased)
- 4A. A.P.R. Manga,
Galigamuwa Town.
5. Godabehepudoge Changa,
Galigamuwa Town.
6. Gamaralalage Punchi Appuhamy,
Galigamuwa Town.

7. Godabehepudoge Appuwa,
Dedathepitiya, Hakahinna.
8. EmageSediris,
“EgodaNiwasa”,
Galigamuwa Town.

Defendants- Respondents

Before : M.M.A.Gaffoor,J. and
S.Devika de L.Tennekoon,J.

Counsel : Lasith Chaminda with Hemala Kumari
For the Plaintiff-Appellant
M. J. M. Naleem for the 1st Defendant
Respondent.

Written Submissions on : Plaintiff-Appellant on 09/02/2015
Defendant-Respondent on 19/5/2017

Decided on : 02/08/2017

M.M.A.Gaffoor,J.

This is a partition action bearing No. P/23447 in the District Court of Kegalle filed seeking to terminate the co-ownership of the Plaintiff and the Defendants. The Learned District Judge in her judgment dated 13.11.1998 at page 219 of the Appeal Brief dismissed the Plaintiff's case and declared that the Defendants had acquired prescriptive title to their plots of lands.

This is an appeal filed by the Plaintiff-Appellant against the said judgment moving for setting aside the judgment of the District Judge of Kegalle and to decide the case in favour of the Plaintiff.

The Plaintiff -Appellant appealed against the above said judgment and prayed to dismiss the appeal and requested to order de-novo. 1st Defendant-Respondent tendered written submissions in this appeal and has prayed to dismiss the appeal and grant relief prayed for.

(It is to be noted that the Plaintiff-Appellant in his written submissions tendered to this Court had referred to a judgment delivered in the District Court of Galle and not Kegalle. Averments 19, we presume that this is a mistake made inadvertently.)

This subject matter of the case is the land called Ehalawatta situated in the jurisdictional area of the Kegalle District Court.

Accordingly, the main issue of the case had been whether the Defendant-Respondents had prescribed their shares to the said corpus by acquiring prescriptive rights to the respective plots of land.

The Plaintiff's position was that this was a co-owned property, which had not been lawfully divided and demarcated, and hence the co-ownership till continues and prayed to partition the corpus according to the statements of claims.

The learned trial Judge has come to the conclusion that according to the evidence revealed that the Defendant-Respondents had possessed the separate block of lands not as a co-owners but as sole owners. Therefore, they had acquired prescriptive rights to the portions of the lands they were possession for the last 50 years with demarcated the definite boundaries. Vide page 225 of the appeal brief.

The Plaintiff's position was that the Plaintiff and the co-owners in their statements of claims admitted that this is a co-owned property.

It is to be further noted that none of the parties to the action prayed for dismissal of the partition action. In the light of this

issue the Plaintiff-Appellant has prayed to this Court to refer this case for re-trial to the original court.

It is pertinent at this stage to consider Section 3 of the prescription ordinance Section 3 reads thus.

Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say 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) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation therefore, or to establish his claim in any other manner to such land or other property, proof of

such undisturbed and uninterrupted possession as hereinbefore explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:

We have taken into consideration of the cases referred to us in this regard *viz. Thilakaratne V. Bastain 21 NLR 12.*

Wickremaratne v. Perera 1986 (1) SLR 12

In Simpson V. Omenru Lebbe, 48 NLR 112 Soertsz SPJ., & Jayethileke, J.

“ As between co- owners separate possession on grounds of convenience cannot be regarded as adverse possession for the purpose of establishing prescriptive title.”

In *Abdul Majeed v. Umma Zaneera 61 NLR 361* court took up the view that long continued possession of the property owned in common is not sufficient to draw an assumption of ouster. It is relevant to consider mater such as

- a. Income derived 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 possession.

In view of the above authorities I am of the view that Defendant – Respondents have not proved ouster and adverse title as required by Section 3 of the Prescription Ordinance.

We note that in the case *of Sirajudeen and Two Others v. Abbas (1994) 2 SLR 365, the Supreme Court* had observed thus: “As regards to the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court”.

“One of the essential elements of the plea of prescriptive title as provided for in Section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner.”

In ***Maria Fernando & Others v. Anthony Fernando (1997) 2 SLR 356 Court of Appeal held that:***

“Long possession, payment of rates and taxes, enjoyment of produce, filling suit without making the adverse party a party, preparing plan and building house on land renting it are not enough to establish prescription among co-owners in the absence of an overt act of ouster. A secret intention to prescribe may not amount to ouster.”

In ***Dias Abeysinghe v. Dias Abeysinghe & Two Others 34 CLW 69 (SC) Keuneman SPJ., & Canakaratne, J.held that:***

“That, where a co-owner erects a new building on the common land and remains in possession thereof for over ten years, he does not acquire a prescriptive right to the building and the soil on which it stands as against the other co-owners merely by such possession.”

In this case the Court further observed thus:

But I do not think we can decide this case on the deeds in view of the fact that all the co-owners possessed portions of the original land has not been established in this case that there was an arrangement arrived by the co-owners to divide the land in such a manner that title was to be effected, and the difficulty is to discover anything which is the equivalent of outer. ” at page. 71.

In the above circumstances as the parties have not prayed for a dismissal of the partition action, this Court cannot grant relief that had not been prayed for.

In ***Surangi Vs. Rodrigo CALA 310/02, Amatarunga J.***
held that :

“ No Court is entitled to or has jurisdiction to grant reliefs to a party which are not prayed for in the prayer to the plaint.”

*We also noted in **Sirinivasa Thero Vs. Sudassi Thero 63NLR 31, Martin Singho Vs. Kularatne CA 248/95 CAM18.12.96 and Dinoris Appuhamy Vs. Sopinona 77 NLR 188.***

In the above circumstances, the only relief that can be granted is to send back the case to be heard in accordance with the requirements of the law in relation to prescriptive title. This matter may be given priority in the original court.

Re- Trial ordered.

JUDGE OF THE COURT OF APPEAL

S.Devika de L.Tennekoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL