

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

Court of Appeal No: C/A 227/99 (F)

D.C Hatton Case No: P /38

1. Amis Premaratne

1a. A.G. Dayawathie Premaratne

b. A.G. Dharmasena

c. A. G. Nanda Piyaseeli

d. A. G. Padmasiri

e. A. G. Gamini Ranjith Premaratne

f. A. G. Nandavathee Premaratne

All of Hagarapitiya Hatton.

2. Wilbert Rajakaruna

3. Ranjith Premarathne

Both of Yatiberiya, Pitawala

Plaintiffs

-Vs-

1. Attala Gamaralalage Pedhiris Singho

2. K.M. Leelawathie

Both of Yatiberiya, Pitawala

Defendants

3. Kangu Mohottilage Somawathie,

Yatiberiya, Pitawala

Added- Defendant

And Between in an Appeal in the Court
of Appeal

1. Attala Gamaralalage Pediris Singho

1a. Attala Gamaralalage Walter Yatiberiya

Yatiberiya, Pitawala

Substituted- Defendant- Appellant

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : M.I.M. Naleem for the 1st & 2nd defendant appellants.

D.P. Munasinghe for the 3rd plaintiff respondent.

ARGUED &

DECIDED ON: 02.05.2017

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

By an appeal dated 20.01.1999 the 1st and 2nd defendants in this case appealed against the judgment dated 20.12.1998 of the learned District Judge of Hatton. By way of their appeal both the 1st and the 2nd defendants seek to impugn the aforesaid judgment on the basis that the learned District Judge has misdirected himself on the question of prescription which the 1st & the 2nd defendants had pleaded in their plaint. The 2nd defendant who intervened in the case claiming a share in the corpus was later on added by the plaintiffs in the amended plaint. When the case was taken up for trial on 22.01.1998, the parties admitted that the corpus that was sought to be partitioned was correctly depicted in the plan bearing No. 6124 dated 24.03.1992. As issue No. 02 recited, the entire case of the plaintiffs was run on the basis of co-ownership among the plaintiffs, 1st, 2nd and 3rd defendants,

whereas the case of the 1st & 2nd defendants was on the basis of prescription which was claimed for more than 60 years.

The 3rd defendant did not raise any point of contest. The 1st plaintiff in the case *Attala Gamaralalage Emis Premarathne* giving evidence testified as to the devolution of the property based on deeds. The original ownership had flowed from a crown grant and according to the pedigree filed in the case, *Premarathne* – the 1st plaintiff reiterated that the land was co-owned between the three plaintiffs and 1st, 2nd & 3rd defendants. In fact the 1st plaintiff closed the case of the plaintiffs reading in evidence deeds marked as P 1 – P 15 to which there was no objections at all on the part of the defendants. These deeds P 1 – P 15 show that the plaintiffs and the defendants all co-owned this land in their respective shares. This oral testimony supported by the documentary evidence such as P 1 – P 15 appears to be confirmed by the surveyor's report which was marked by the 1st plaintiff as X 1. According to X 1 - the Surveyor report, it is clearly specified by the surveyor that the plaintiffs and the defendants are in possession of the land. Nowhere does the report indicate that only the defendants are in possession of the entire corpus. The 1st plaintiff also testified that until the father of the 1st defendant died in 1989, the father of the 1st defendant had been giving shares of income to the plaintiffs. This evidence has not been contradicted by the defendants in the case. The question arises as to why the 1st defendant's father should pay a share to the plaintiffs if he was adversely

possessing this corpus against the interests of the plaintiffs. This acknowledgement on the part of the father of the 1st defendant shows that there was no ouster of the plaintiffs from the land. In the course of his testimony the 1st defendant *Pedirik Singho* admits that his father had transferred a land in extent of one acre to him. However, this deed was not produced by the 1st defendant. If his father had possessed the entire land and become the owner of this land by prescription, it is all the more reason why this plaintiff should have produced this deed to establish that he has secured a co-ownership to this property. This Court observes that all the deeds that were produced by the plaintiffs clearly show that the 1st defendant is a co-owner. Even though his oral testimony is silent on the fact of co-ownership he has not contradicted the deeds that confer co-ownership on the 1st defendant. It also appears that the 2nd defendant who is the wife of the 1st defendant has also obtained co-ownership rights through a deed bearing No. 2461 and dated 30.01.1984-Vide the deed marked as P 9. This also proves co-ownership rights on the part of the 2nd defendant. The 2nd defendant herself in the course of her testimony admits that she and her husband co-owned this land. When her right is only to a portion of this corpus as indicated by P9, her answer has to be taken to mean that her co-ownership along with her husband is in respect of the corpus along with the plaintiffs.

Having gone through the evidence led in the trial and having regard to the documents that have been produced before Court I take the view that prescription has not been established by the 1st & 2nd defendants on the standard required to prove prescription. The evidence both documentary and oral strengthens the fact that there has been co-ownership among the parties. It has to be remembered when there is proved co-ownership among the parties there has to be an ouster of the other co-owners if the 1st and 2nd defendants were to succeed in their plea of prescription. At this stage this Court bears in mind the jurisprudence of *Corea Vs. Iseris Appuhamy* 15 NLR page 65 where the Privy Council held that every co-owner must be presumed to be in possession qua a co-owner and it is not possible for one co-owner to secretly entertain an intention to put an end to co-ownership and this case states quite clearly that nothing short of an ouster or something equivalent to an ouster should be established to bring about a termination of co-ownership.

In *Tillekaratne vs. Bastian* 21 N.L.R 12 the full bench of the Supreme Court (Bertram CJ, Shaw and De Sampayo JJ) formulated three propositions of law applicable to what is meant by the word "adverse" in terms of Section 3 of the Prescription Ordinance (especially at page 18).

The proposition that is apposite to the instant case is as follows:

"A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity"

The Supreme Court observed in the case that; “the effect of this principle is that, where any person’s possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. And what must he prove? He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession.....” (at page 19)

In *Sirajudeen and two others v. Abbas* (1994) 2 Sri.LR 365 at 370 –(SC) G.P.S. de Silva, CJ held that where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for him or her acquisition of prescriptive rights. If the father of the plaintiff had passed away in 1989 there is no evidence before Court that adversity on the part of the 1st & the 2nd defendants had continued for 10 years prior to the bringing of this action that took place in 1990. In the circumstances, this Court takes the view that the 1st & 2nd defendants had not succeeded in establishing prescription at all in the case. This Court has gone through the judgment dated 20.12.1998 of the learned District Judge of Hatton and I see no reason to interfere with the evaluation of evidence and findings he has reached on the facts that are engulfed in this case. In the circumstances, this Court proceeds to affirm the judgment dated 20.12.1998 and dismiss the appeal.

The Registrar is directed to despatch a copy of this Order along with the record to the District Court of Hatton for further steps to be taken in the District Court.

JUDGE OF THE COURT OF APPEAL