

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

Dissanayake Lekamlage Nimal
Jayatiss of Puwakgaha Deniya
Algama.

7th Defendant-Appellant.

C.A.No.948/97 (F)

Vs.

D.C.Kegalle No.21371/P.

1a.Dissanayaka Arachchilage
Wickremanayake

Ihalagama Algama

Substituted 1st Plaintiff

Respondent-Respondent

2a. Apuralalage Piyasena

Pahalagama, Lawngama

**Substituted 2nd Defendant
Appellant**

1a Rathnayaka Pathirennhelage
Leelawathi

1b. Lionel Donald Tilak

Kumara

1c. Ramani Lilanthi Kumara

1d. Ranjini Kumari all of
Puwakgahadeniya, Algama

All of Puwakgahadeniya, Algama

And others

**Substituted-Defendant-
Respondents**

BEFORE : M.M.A.Gaffoor,J

COUNSEL : Chandana Wijesooriya for the
Substituted 7th Defendant-Appellant
Nimal Muthukumarana for the
Plaintiff-Respondent.

ARGUED ON : 07.07.2017

WRITTEN SUBMISSIONS

FILED ON : 7th Defendant-Appellant filed on
02/10/2018
Plaintiff-Respondent filed on
27.11.2018

DECIDED ON : 27/02/2018

M.M.A. Gaffoor, J.

This appeal emanates from the judgment of the learned District Judge Kegalle 21371/P whereby the plaintiff has sought to partition the co-owned property depicted in the schedule to the plaint. "Thalanugahamula ovita".

The case proceeded with

1 - 5 issues raised by the plaintiff.

6 - 13 issues raised by the 5th defendant,

14 - 19 raised by the 7th defendant.

The main contention of the plaintiff was that according to issue 5 whether the plaintiff Dissanayake Arachchilage Wickremanayake had acquired prescriptive title to the land in issue.

5th defendant in issue No.13 also had raised the issue of prescription in respect of the land in dispute.

The 7th defendant too by issue No.18 raises the issue of prescription.

The learned Trial Judge after trial had pronounced the judgment on 24.07.1997 (Appeal brief 203). The trial Judge had

accepted the corpus to be partitioned is depicted in plan No.2435 marked X pertaining to the land called “Thalanugahamula owita”

The learned District Judge had made the following observations in his judgment page 208 appeal brief.

- a. The 1st defendant had submitted an incomplete pedigree.
- b. The 7th defendant too had accepted the pedigree submitted by the 1st defendant.
- c. The 1st and 7th defendant in their evidence as taken up the position that their father Punchi Appuhamy had acquired title though a plantation agreement but had failed to adduce the said agreement in evidence.
- d. The 5th defendant had adduced evidence that she has acquired possession through her father. The 2nd plaintiff too has adduced evidence that she had possessed part of the land.

In the case of ***Kiramma Vs. Podi Banda and other - 2005 BALJ 9***, Udulagama J adverted to very important points that has to be borne in mind in a claim of prescriptive title.

They can be summarized as follows;

- 1) The burden of proving possession is on the party claiming prescription.
- 2) Prescription is a question of fact.
- 3) Title by prescription is an illegality made legal.
- 4) In Sri Lanka prescriptive title is required to be by adverse to an independent of a claimant.

In the case of ***Thilakarathne Vs. Bastian – 21 NLR and Perera Vs. Menchi Nona***, the principle of prescription has been further enunciated, the burden of proving prescriptive title is in fact should be definite and heavy. This principle is in fact embodied in the Evidence Ordinance which stipulates that “one who asserts must prove”. Therefore the substantive law, the Evidence Ordinance too stipulates this situation.

Section 101 of the Evidence Ordinance Illustrations (b) “ A desires a Court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true”.

The above principles have been enunciated in ***De Silva Vs. Director General Inland Revenue 80 NLR 292***. In the case of

Weragoda Vs. Peiris 1996(2) SLR 56 it is observed “Right of possession to cultivate acknowledges the right of some other person.”

In the case in point the 1st and the 7th defendants have taken up the position that their father Punch Appuhamy has acquired title through a “Waga Bukthiya”. Therefore until such time as they shed their right of limited possession, adverse possession will not commence.

In the case of **Bandara Vs. Sinhappu 47 NLR 249** log continued and undisturbed and uninterrupted possession by a co-owner could constitute a presumption of ouster against other co-owners. Each co-owner can acquire title by prescription to the specific portion in his land. In the case of **Siyathu Hamy Vs. Podi Menike 2004 (2) SLR 323** it was observed that possession of one co-owner is presumed as possession for and on behalf of all other co-owners. In order to prescribe against the co-owners the other co-owner must prove the commencement of an act of ouster and adverse possession.

The trial Judge has come to the conclusion the corpus to be partitioned is co-owned property. And various parties have made their claims as regards to buildings and other constructions and

plantations in the corpus before the surveyor who surveyed the land on a commission.

On the basis of the above judgments the learned District Judge had come to the correct conclusion and has answered the issues in respect of the above case in his judgment at page 211.

We see no reason to interfere with the judgment.

Hence the considered judgment of the learned District Judge of Kegalle cannot be disturbed.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL