IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

C.A. No. 532/97 F
D. C. Kandy No : P 13140

1. Rajapakse Walimuni Mudiyanselage Biso Menike

2. Wilwara Mudiyanselage Ananda Wilwarage

3. Wiwara Mudiyanselage Wasala Wilwarage

4. Wilwara Mudiyanselage Kapila Wilwarage
of 160/1, Amunugama,
Gunnepana.

Plaintiff Appellants

Vs.

1. Wilwara Mudiyanselage Subadda Wijesuriya

2. Wilwara Mudiyanselage Subadrani Wijesuriya
of 160/1, Amunugama,
Gunnepana.

3. Upali Rathnayake
160/1, Amunugama,
Gunnepana.

4. Ariyawathi Menike Rathnayake
of 3/160, Aunugama,
Gunnepana.

Defendant Respondents

BEFORE : **M.M.A. Gaffoor, J. and**

Janak De Silva, J.

COUNSEL : D.H. Siriwardane for the 1st to 4th Plaintiff-Appellants.

G.D. Kulatilake for the 1st and 2nd Defendant-Respondents.

W.D. Weeraratne for the 3rd and 4th Defendant-Respondents.

ARGUED AND

DECIDED ON : 30/05/2018

M.M.A.Gaffoor,J.

This is an appeal from the judgment of the Learned District Judge of Kandy in respect of a partition action Number P13140.

The Plaintiffs Appellants [hereinafter referred to as the Appellants] instituted this action seeking to partition the land called "Wetakedeniye" also known as Walawwapitiyahena" depicted in Plan Number 6139 dated 19. 10. 1993 made by G. R. W. N. Weerakoon Licensed Surveyor marked as "X" and produced and file of record.

It is noted that there was no contest regarding the corpus and the original owners. But the contest was regarding the devolution of title and how the building standing in the particular "Wetakadeniye" also known as Walawwapitiyahena should be allocated to the parties.

The Appellants claimed that particular house marked as "G" in plan Number 6139 as their original ancestral home or "Mulgedara" and where they had been in occupation right through out.

The Appellants and the 1st and 2nd Defendants – Respondents hereinafter referred to as the 1st and 2nd Respondents] claimed 2/3 of the Mulgedara house as they get their shares of the land and the balance 1/3 only should go to the 3rd and 4th Defendants-Respondents [hereinafter referred to as the 3rd and 4th Respondents]

and they mentioned that the 3rd and 4th Respondents are out siders and they were the contesting parties in Lot 2 in Plan No. 6139 dated 19. 10. 1993 marked as "X" and that they have possessed the said house "G" and consequently they have acquired a prescriptive title.

Before coming to the pleadings the real owners of this house were Punchi Banda, Wijesuriya and Tikiri Menike.

The Appellants and the 1st and 2nd Respondents got their 2/3 shares of the said "Mulgedara" house there on from their predecessors in title for the land and house from Punchi Banda and Wijesuriya and on the other hand Tikiri Menike's 1/3 share transferred to 3rd and 4th Respondents.

The 3rd and 4th Respondents claimed that they are entitled to Lot 2 in Plan 6139 marked as "X" and the prescriptive right and also claimed the building marked as "H", "G" and "J" standing in the said Lot 2 in Plan No.6139 and mentioned that the Appellants' predecessors had left their portion of the house and never came to the house after 1964 and thereby that favored clear prescriptive title and

the 3rd Respondent pleaded that in addition to the title, he constructed a building, renovated the old house, made improvement and added extensions without any interruption or objections from the Appellants and the 1st and 2nd Respondents.

The Appellants and the 1st and 2nd Respondents had filed an action against the 3rd and 4th Respondents with regard to the same house and land, later the Appellants and the1st and 2nd Respondents withdrew the said action, and it was dismissed and further there was no denial of the possession of the 3rd and 4th Respondents.

Later the Appellants had filed this partition action in respect of the same land along with the building in the District Court of Kandy.

The learned District Judge of Kandy who heard the evidence and held that the house marled as "G" should go entirely to the 3rd and 4th Respondents and 2/3 share claimed by the Appellants and the 1st and 2nd Respondents were not allotted to them.

The learned District Judge took up a position that the 3rd and 4th Respondents were undisturbed and uninterrupted the possession for a

certain long period and the particular house was old and repairs, improvements were done by them.

The Appellants move the Judgment of the learned District Judge dated 2nd February 1997 be set aside and the Judgment to be entered as prayed for in the Plaint.

Following grounds have been urged on behalf of the Appellants to set aside the Judgment of the learned District Judge.

It is submitted that the said Judgment is contrary to law and the weight of evidence led at the trial and had failed to consider co-owners do not lose their rights without an ouster and also he had misdirected himself in deciding the purported improvements done by the 3rd and 4th Respondents as a criterion to decide the title. It is also stated that the learned District Judge had considered irrelevant facts and law in deciding the case and had non-considered and disregarded relevant vital evidence/ facts and law has failed to adduce reasons.

Prescription

The facts that germane to the issue are whether the 3rd and 4th Respondents had prescribed the house in contention "G" is standing on co-owned land in terms of Sections 3 of Prescription Ordinance.

The issue No. 17 raised before the learned District Judge read as:-

> "In the event of this Court accepting the separate distinct possession among the said parties, there has been a common possession by the parties?"

Answer given to that has no separate and distinct possession proved. The land had been commonly possessed. It is a clear fact that the land including the building co-owned land and had been commonly possessed.

According to the provisions of Section 3 of the Prescription Ordinance Act No. 2 of 1889 the claimant must prove,

1. Undisturbed and uninterrupted possession
2. Such possession to be independent or adverse to the claimant plaintiff and
3. Ten years previous to the bringing of such action.

In order to initiate a prescriptive title, it is necessary to show a change in the nature of the possession and the party claiming prescriptive right should show an ouster.

In **D.R. Kiriamma V. J.A. Podibanda and 8 Others 2005 B.L.J. 9** in order to claim prescriptive title Udalagama J. Averted that,

"*onus probandi or the burden of proving possession is on the party claiming prescriptive possession. Importantly, prescription is a question of fact. Physical possession is a factum probandum. I am inclined to the view that considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that title by prescription is an illegality made legal due to the other party not taking action. It is to be reiterated that in Sri Lanka prescriptive title is required to be by title adverse to an independent to that of a claimant or Plaintiff.*"

In **De Silva V. Commissioner General of Inland Revenue 80 NLR 292** Sharvananda J. clearly and deeply observed that,

"The principle of law is well established that a person who bases his title adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no hostility to or denial of the title of the true owner there can be no adverse possession. In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the animus of the person doing those acts, and this must be ascertained from the facts and circumstances of each case and the relationship of the parties. Possession which may be presumed to be adverse in the case of a stranger may not attract such a presumption, in the case of persons standing in certain social or legal relationships. The presumptions represent the most likely inference that may be drawn in the context of the relationship of the parties. The Court will always attribute possession to a lawful title where that is possible. Where the possession may be either lawful or unlawful, it must be assumed, in the absence of evidence, that the possession is lawful. Thus, where property belonging to the mother is held by the son, the presumptions will be that the enjoyment of the son was on

behalf of and with the presumption of the mother. Such permissive possession is not in denial of the title of the mother and is consequently not adverse to her. It will not enable the possession to acquire title by adverse possession. Where possession commenced with permission, it will be presumed to so continue until and unless something adverse occurred about it. The onus is on the licensee to show when and how the possession became adverse. Continued appropriation of the income and payment of taxes will not be sufficient to convert permissive possession into adverse possession, unless such conduct unequivocally manifests denial of the perimeter's title. In order to discharge such onus, there must be clear and affirmative evidence of the change in the character of possession. The evidence must point to the time of commencement of adverse possession. Where the parties were not at arm's length, strong evidence of a positive character is necessary to establish the change of character."

Referring into the present matter that the 3rd Respondent in his evidence states that:- (at page No.122 of the Appeal brief)

ප්‍ර: 3 වි 4 සැලැස්මේ තිබෙන ගෙය මෙම නඩුවේ පාර්ශවකරුවන්ගේ මුල් ගෙය බව?

කැබලි අංක 1 දරණ කොටසේ තිබෙන ගෙය මෙම නඩුවට අයිති පුද්ගලයන්ගේ පෙළපතේ මුල් ගෙදර බව පිළිගන්නවා ද?

උ: මුල් ගෙදර.

ප්‍ර:- තමා පිළිගන්නවාද ඒ අක්ෂරය දරණ කැබැල්ල පමණයි ටිකිරි මැණිකේ විසින් අත්සන් කර තිබෙන ඔප්පුවල තිබෙන්නේ?

උ: ඔව්.

The 3rd Respondent further stated in his evidence that :- (at page No.129 of the Appeal brief)

.... ආරවුලක් පැන නැඟුනේ නැහැ. අවු11 ක් ගියාට පසු, මේ ගෙය අවු 100ක් විතර පැරණි ගෙයක් එය මා කඩා ඉවත් කර 90 ක් පමණ අළුතෙන් හැදුවා. සීට් දැම්මා. අළුතෙන් බිත්ති බැන්දා. පොළොවට සිමෙන්ති දැම්මා.

ණය වෙලා මම මේක හැදුවේ.

ප්‍ර: තමා ඔය කියන කටයුතු කරන්නට මේ නිවසේ හවුල් අයිතිකරුවන්ගේ අවසරය ලබා ගත්තේ නැහැ?

උ: නැහැ

At page No. 126 of the Appeal brief that the 3rd Respondent testified as :-

ප්‍ර: තමා පිළිගන්නවා කැබලි අංක 1 දරණ කොටසේ 3වි4 ගෙය කැලි 3කට කඩා තිබෙනවා?

උ:. ඔව්.

ප්‍ර: ඒ.බී.සී.කියා 3ක් තිබෙනවා නේ ද?

උ: ඔව්.

ප්‍ර: එතෙක් තමාගේ ඔප්පුවල තිබෙන්නේ ඒ දරණ ගෙය ගැන පමණයි?

It is evident that the Mulgedara has been split into 3 parts and the 3rd Respondent according to his deed owned 1/3 of the house.

The 3rd Respondent's evidence significant, in order to consider their state of mind and the nature of their possession.

In Sirajudeen and Two Others v. Abbas – SLR – 365, Vol 2 of 1994 the Supreme Court has observed thus:

As regards the mode of proof of prescriptive possession, mere general statements of witness 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 Juliana Hamine v. Don Thomas – 59 NLR – 546 at 548

.....Apart from the use of the word possess, the witness called by the plaintiff did not describe the manner of possession.

In Alwis V. Perera (1919) 21 NLR at page 326 Bertram C.J stated that,

" I wish very much that District Judges I speak not particularly, but' I possessed' or we possessed or we took the procedure, would not confine themselves

merely to recording the words, but would insist on those words being explained and exemplified."

In Corea v. Appuhamy Et Al. (1911)15 NLR 65 the privy Council decision laid down for the first time in clear and authoritative terms the following principles:

1. The possession of one co-owner, was in law, the possession of others,
2. Every co-owner must be presumed to be possessing in that capacity,
3. It was not possible for such a co-owner to put an end to that title and to initiate a prescriptive title by any secret intention in his own mind and
4. That nothing short of an ouster, could bring about that result.

In Tillekeratne v. Bastian [1918] 21 NLR 12 Bertram C.J referring to the real effect of the decision in **Corea v. Iseris Appuhamy** upon the interpretation of the word "adverse" with reference to cases of co-ownership stated that the word must be interpreted in the context of three principle of law :

(i.) Every co-owner having a right to possess and enjoy the whole property and every part of it, the possession of one co-owner in that capacity is in law the possession of all.

(ii) Where the circumstances are such that a man's possession may be referable either to an unlawful act or to a lawful title, he is presumed to possess by virtue of the lawful title.

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

In **Leisa and Another v. Simon and Another – SLR – 148, Vol 1 of 2002** Justice Wigneswaran had clearly stated that long period possession alone court not establish any prescriptive title to the land.

"*Possession and occupation must be distinguished. The long period of occupation would not make it an adverse possession unless there had been an overt act of ouster as in the case of prescription among co-owners. The learned Judge also seems to have overlooked the difference between long occupation as a licensee and adverse possession.*"

Wickremaratne and Another v. Alpenis Perera – SLR – 190, Vol 1 of 1986 held that,

" in a partition action for a lot of land claimed by the plaintiff to be a divided portion of a larger land, he must adduce proof that the co-owner who originated the division and such co-owner's successor had prescribed to that divided portion by adverse possession for at least ten years from the date of ouster or something equivalent to ouster. Where such co-owner had himself executed deeds for undivided shares of the larger land after the year of the alleged dividing off it will militate against the plea of prescription. Possession of divided portions by different co-owners is in no way inconsistent with common possession.

A co-owner's possession is in law the possession of the co-owners every co-owner is presumed to be in possession in his capacity as co-owner. A co-owner cannot put an end to his possession as co-owner by a secret intention in his mind Nothing short of ouster or something equivalent to ouster could bring about that result".

Even though the Appellants predecessors in 1964 left their portion leaving behind their paraphernalia and furniture at their portion of the said house marked as 'G' would not amount to long possession and which does not show an ouster and in my view leaving behind their

furniture and paraphernalia could be Animus Revertenti that means intention to return and the Appellants and the 1st and 2nd Respondents would not forfeit their possessing right over the said "Mulgedara".

In Kanapathipillai v. Meerasaibo – NLR – 41 of 58 [1956] Sansoni J with H.N.G. Fernando J. concurring has held as follows,

"The rule is well settled that when a co-owner convey the entire land held in common to a stranger, and the latter enters into possession of the entire land under the conveyance, he can, by possession adverse to all the co-owners for ten years, acquire a prescriptive title, But where such a stranger is aware, at the time he obtains the conveyance, that his vendor was only a co-owner and was not a sole owner of the land, ten years possession by him will not give him a prescriptive title. Such a purchaser cannot be said to have entered into possession as a sole owner, for the knowledge that there were others who owned shares in the land, and he will be presumed to have possessed the land as a co-owner. The ordinary rule which applies to possession by co-owners will then apply, viz., that before one can prescribe against the others there must be an ouster or something equivalent to an ouster. Hence prescriptive

possession will begin to run in his favour against those others only if there has been an ouster or its equivalent, such as notice to those other co-owners that he was setting up a title adverse to them"

It is to be noted that the 3rd and 4th Respondents were in possession for a long period does not qualify them to claim absolute ownership and the 3rd and 4th Respondents had failed to prove an overt act of ouster.

The Learned District Judge had failed to consider that the 3rd and 4th Respondents' were in possession of the said house and the co-owners did not lose their rights.

Improvements

Considering the fact that pleaded by the 3rd and 4th Respondents that they had renovated the old "Mulgedara" house marked as 'G' made improvements and added extensions cannot be sufficient to establish prescriptive title against the other co-owner.

In view of **Maria Fernando and Another v. Anthony Fernando – SLR – 356, Vol 2 of 1997** Court of Appeal held that,

"Long possession, payment of rates and taxes, enjoyment of produce, filing suit without making the adverse party, a party, preparing plan and building house on land and 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."

Also in **Dias Abysinghe V.Dias Abeysinghe and Two others 34 CLW 69 (SC)** observed that,

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

It is clear that these general principles analyzed that the improvements, renovations made in common land or a building cannot be established prescriptive title against other co-owners.

The Learned District Judge was misdirected himself in deciding the improvements done by the 3rd and 4th Respondents in order to decide the title.

Res Judicata

The Counsel for the 3rd and 4th Respondents took up a position in his written submission that,

Plaintiffs (the appellants) also admitted that D.C. Kandy case No.17334/L was filed in respect of the House "G" which was later withdrawn reserving no right to file a fresh case. The said action was dismissed accordingly. It is respectfully submitted once a case is withdrawn without reserving rights to file a fresh case it becomes "Res Judicata".

The Complainants' (the Appellants) instituted an action against the 3rd and 4th Defendants (the Respondents) in the District Court of Kandy case number bearing 17334/L on 13th January 1993, seeking an injunction or stay order for restricting the undergoing constructions of

the questioned building also known as "Mulgedara" Pg.217 of the appeal brief marked as 3 v 1.

Answering the cross examination that the 3rd respondent testified as;

ප්‍ර: L 17334 නඩුව දැම්මේ ඉඩම බෙදා වෙන්ක ගන්නට නොවේ. ඕක පිළිගන්නවද?

ප්‍ර: 3වි 1 වශයෙන් L 17334 පැමිණිල්ල ලකුණු කරා නේ ද?

උ: ඔව්.

ප්‍ර: ඒකේ පැමිණිල්ලෙන් යෝජනා කර තිබෙනවා පැමිණිලිකරුට අයිති මෙම ගොඩනැගිලි විත්තිකරුවන් නීති විරෝධී ලෙස කඩා බිඳ දමමින් අළුතෙන් සෑදීමට උත්සාහ කරනවා කියා එම පැමිණිල්ල තමයි 1993 ඉල්ලා අස්කර ගත්තේ?

උ: ඔව්.

In the meantime the complainants (the Appellants) had instituted a partition action against the Respondents to divide the questioned land and the building, in the same District Court under case no. P 13140 on 8th of June 1993.

Therefore, complainants withdrew the aforementioned land dispute action/ 1733/L on 6th of October1993 at Pg.235 after filing the partition action/P 13140.

The 2nd complainant testified that he withdrew the land dispute action that was filed, because he wished to partition the house and the land.

At Pg. 24 of the Appeal brief that the 2nd complainant testified as;

"මට ඉඩම බෙදා ගන්නට ඕනෑ නිසා ඉල්ලා අස්කර ගත්තා"

At Pg. 89 of the Appeal brief that the 2nd complainant testified as;

"ඒකට හේතුව මගේ ගෙය හා ඉඩම දෙකම බෙදා ගන්නට"

In Rev. Moragolle Sumangala v. Rev. Kiribamune Piyadssi – NLR – 322 of 56 (1955)

Two important tests must be applied whenever plea of res judicata is raised:

(1) *Whether the judicial decision in the earlier litigation was, or at least involved, a determination of the same question as that*

sought to be controverted in the later litigation in which the estoppel is raise, and, if so,

(2) *Whether the parties to the later litigation are the parties or the parties of the parties to the earlier decision.*

I see no reason to interfere with the findings of the Learned District Judge regarding the plea of res judicata and it had no application in the original action.

Considering all the evidence I am of the view that, the aforementioned land dispute and partition actions were based on different issues and grounds but they were among the same parties.

Accordingly, I hold that the plea of res judicata is failed.

In my opinion, it is to be discussed in view of Section 406 of Civil Procedure Code.

Section 406 (1) – if, at any time after the institution of the action, the court is satisfied on the application of the Plaintiff-

(a) That the action must ail by reason of some formal defect, of

(b) That there are sufficient grounds for permitting him to withdraw from the action of to abandon part of his claim with liberty to bring a fresh action for the subject matter of the action, of in respect of the part so abandoned,

The court may grant such permission on such terms as to costs of otherwise as think fit.

(2) If the Plaintiff withdraw from the action, of abandon part of his claim, without such permission, he shall be liable for such costs the court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part.

In **Fernando v. Fernando – NLR – 99 of 3 held that,**

"the District Court is empowered to dismiss or allow the withdrawal of an action with liberty to re-institute the case on the same cause. Even if a lower court has not given reasons to justify the grant of such permission if it appears to the Supreme Court that there were good reasons, plea of res judicata does not debar such re-institution."

And also in **Jayawardene V. Arnolishamy 69 NLR 497** held that, the term "subject matter" in section 406 of the CPC does not

mean the property in respect of which an action is brought. It includes the fact and circumstances upon which the Plaintiff's right to the relief claimed by him depends.

The dismissal of an action upon its withdrawal by the plaintiff gives rise to the statutory bar provided for in section 406 (2) of the Civil Procedure Code. It does not, however, provide the basis for a plea of res judicata properly so termed, because there is no adjudication.

I am of the view that plea of res judicata shall not succeed and the Appellants have all their rights to maintain a fresh action.

The counsel for the Appellants submitted in their written submission, which the issue No. 20 read as follows,

Are the 3rd and 4th Defendants entitled to all the buildings on Lot 2?

The answer to the said issue No. 20 is that the 3rd Deferent is entitled to building marked "G" and the 4th Defendant is entitled to buildings marked "H" and "J".

And further the learned counsel states in the written submission as;

Contrary to the said position the Learned District Judge has granted the house,(the building) marked "G" to 3rd and 4th Respondents. Learned District Judge's purported rationale is that since the plaintiffs and their predecessors had abandoned the building, it has to be accepted that the said building marked "G" had been renovated by the 3rd and 4th defendants and hence the building should be granted to the 3rd defendant Respondent. This is an erroneous finding of fact as the same is against the weight of evidence. This should not have been the criterion in developing right. This is a clear misdirection. Irrelevant facts which are not been borne out by evidence had been considered the relevant facts/ evidence which has direct bearing had been disregarded. There is no proper

consideration and evaluation of evidence adduced in the District Court. Hence there are questions of law.

It is to be noted that there is a merit in the aforementioned submissions of the counsel for the Appellants that the Learned District Judge's approach to this case has not been sound according to the decided cases.

In **Dona Lucihamy V. Cicilyahamy 59 NLR 214 at 216** mentioned that bare answers to the issues or points of contest whatever may be the name given to them are insufficient unless all matters which arise for decision under each head are examined.

In **Warnakula V. Ramani Jayawardena (1990) 1 Sri LR 206** stated that evidence germane to each issue must be reviewed or examined.

In **Sopinona V. Pitipanaarachchi (2010) 1 Sri LR 88** observed that answering only points of contest raised by one party in a partition action an failing to consider the points of contest raised by other parties amounts to denial of justice to the latter

parties for fault of theirs. Failure to consider the deeds and other documents produced by the respondents at the trial leads to the conclusion considering the rights of the respondents, there had in fact been a miscarriage of justice.

And also Justice Janak De Silva in **Muththananda Namperumage Dhanayaka V. Nanayakaravasam and Others CA 1340/99F** observed the context of perfunctory judgments compliance with Section 187 of the Civil Procedure Code and held that the Learned District judge has not referred to his evidence in the judgment.

I am of view that, the Learned District Judge has misdirected himself and given bare answers to some of the issues without evaluating the evidence and failed to adduce reasons.

I am of the firm view, that the Learned District Judge who heard the evidence has allotted the Mulgedara house to the 3rd and 4th respondents only by bearing the fact that they renovated and added extensions to the house and were in possession for a long

period of time, even though the 3rd and 4th respondents had not proved the ouster of the other co-owners, mere possession for a longer period would not amount to absolute ownership.

The appellants and the 1st and 2nd respondents non occupation of the house does not forfeit their right to Mulgedara.

For the foregoing reasons, I allow the appeal with costs and set aside the judgment of the learned District Judge of Kandy dated 2nd February 1997. I further hold that the appellants and the 1st and 2nd respondents are entitled to their 2/3 shares of the house marked "G" and known as Mulgedara or ancestral house. 3rd and 4th respondents only entitled to 1/3 share of the hose marked "G".

JUDGE OF THE COURT OF APPEAL

Janak de Silva,J.

I agree.

JUDGE OF THE COURT OF APPEAL.