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

1a. Indrasiri Jayawickrema,
1b. Champa Priyangani Jayawickrema,
1c. Nihal Dayananda Jayawickrema
2. Appukutty Kankanamalage Kusumawathi
3. Indrasiri Jayawickrema
4. Nihal Dayananda Jayawickrema
5. Champa Priyangani Jayawickrema,
All of Main Street,
Pottuvil.

Defendant-Appellants

C.A. No. 1153/2000(F)
D.C. Kalmunai No. 2128/L

Vs.

1. Punchi Hewage Eddie de Silva
2a. Washini Theeshana Dilanthika de Silva
3a. Lakshan Rananjaya de Silva
2. Punchi Hewage Rukmani de Silva
3. Punchi Hewage Pemadasa de Silva
4. Punchi Hewage Sunil de Silva
5. Punchi Hewage Ranjith de Silva
6. Punchi Hewage Dayawathi de Silva
7. Punchi Hewage Nandana Chandralatha de Silva
8. Punchi Hewage Anura de Silva
All of Kusuma Rice Mill, Potuvil

Plaintiff-Respondents

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BEFORE : M.M.A.GAFOOR, J. &
JANAK DE SILVA, J.

COUNSEL : Rohan Sahabandu P.C. with H. Amarasinghe for the Defendant-Appellants.
U.L.A. Majeed for the Plaintiff-Respondents.

ARGUED ON : 12-09-2017.
WRITTEN SUBMISSIONS
TENDERED ON : 10-11-2017(By the respondents)
12-03-2018(By the appellants)

DECIDED ON : 30th May,2018

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M.M.A.GAFOOR, J.

The Plaintiff-Respondents in this case instituted the above numbered and styled action in the District Court of Kalmunai against the Defendant-Appellants by plaint dated 22.03.1995, averring inter alia, that Vidana Gamage Premawathy alias Kusumawathy Jayawickrema, mother of the Plaintiff-Respondents and her brother the 1st Defendant-Appellant owned and possessed in common a land described in schedule **A** to the plaint and they entered into an executed a deed of partition No. 3021 dated 30.03.1984, whereby the allotted northern half of the portion of that land described in schedule **B** to the plaint to the said Premawathy alias Kusumawathy and southern half portion of it to the 1st Defendant-Appellant.

According to the answer dated 26.07.1995, the Defendant-Appellants admitting the said deed of partition and the said Respondents or Premawaty alias Kusumawathy never possessed the said northern half portion and that they had possessed the whole land for a long time and had prescribed title to the said northern portion as well. The Plaintiff-Respondents in their plaint further averred that the 1st Defendant-Appellant for the first time in the 1st week of August 1994 tried to prevent the Plaintiff-Respondent from entering the land. This content was denied by the Appellants in their answer.

The Plaintiff-Respondents also averred that a case No.15683 under section 66 of the Primary Court Procedure Act in the Magistrate's Court of Akkaraipattu and the order was made therein placing the 1st Defendant-Appellant in possession. This was admitted by the Defendant-Appellants.

The Plaintiff-Respondents prayed for declaration of title in their favour and ejectment of the Defendant-Appellants from the land and damages and costs. The Defendant-Appellants opposed to this and prayed for dismissal of the action with costs.

The case went for trial and after the conclusion of the evidence, both parties tendered their written submissions and the judgment was delivered on 08.11.2000, in favour of the Plaintiff-Respondents as prayed for in their plaint.

Being aggrieved and dissatisfied with the said judgment dated 08.11.2000, this appeal was filed by the Defendant-Appellants in order to quash and set aside the said judgment dated 08.11.2000.

And also the Defendant-Appellants in their petition stated that

a) The said judgment is contrary to law and the weight of evidence in the case,

b) The learned District Judge non-directed himself to the contradiction between the averment in paragraph 7 of the plaint that for the first time the 1st Defendant-Appellant in the 1st week of August 1994 tried to prevent the Plaintiff-Respondents from entering the said land and the 1st Plaintiff-Respondent's evidence that the 1st Defendant-Appellant in 1994 attempted to erect a hut on the land and he prevented it, and such non direction amounts to a misdirection in law,

c) The learned District Judge non-directed himself to the 3 contradictions between the 1st Plaintiff-Respondent's evidence that he prevented the 1st Defendant-Appellant from erecting a hut on the land and the Plaintiff-Respondents' witness Arulampalam Sathananthan that in or about 1993 the 1st Defendant-Appellant erected a shop on the land and let it to a returned refugee, and such non-direction amounts to a misdirection in law,

d) The learned District Judge has failed to draw the correct inferences or drawn wrong inferences from the evidence and this amounts to an error of law.

The Plaintiff-Respondents in their answer averred the land more-fully described in schedule **A** to the plaint is in extent of 44 perches was owned and possessed jointly by Premawathy alias Kusumawathy Jayawickrema, the Plaintiff-Respondent's mother and her younger brother Dhanapala Jayawickrema, the 1st Defendant-Appellant since 1939.

By deed of partition bearing No.3021 was admitted by both parties and the said land was amicably partitioned and divided to the said Kusumawathy Jayawickrema that the Respondents' mother and her brother Dhanapala Jayawickrema, the 1st Defendant-Appellant. According to. said Kusumawathy Jayawickrema, she became the absolute owner of the northern half share of 22 perches morefully described in schedule **B** to the plaint, and the said Dhanapala Jayawickrema, the 1st Defendant-Appellant above named, became the absolute owner of the southern portion in extent of 22 perches morefully described in schedule **B** to the plaint.

In the evidence in this case, southern portion has a building and a house where the 1st Defendant resides with his family and the northern portion is a bare land which contain a well and some coconut trees. The

Plaintiffs' mother Kusumawathy did not live there but possessed the land by using the well and plucking coconuts from trees in her portion of the land until she died in 1987. She died in 1987 due to terrorist attack on a bus which she travelled. After Kusumawathy's death her children 1st to 10th Plaintiff-Respondents became entitled to the said land by inheritance and possessed the said portion.

Since the Sinhalese people in the Pothuvil area were subjected LTTE terrorist attack in 1987 some of them left the area including the 1st Defendant and they came back there to resettle in the latter part of 1993. The 1st Defendant and his children who came back in the latter part of 1993 without any right or title to the land in dispute which is morefully described in the schedule **B** to the plaint surreptitiously tried to put up a boutique in 1994. The 1st Plaintiff when came to know about the unlawful act, lodged a complaint with the Pothuvil Police to prevent the Defendant from proceeding with the work and that the Plaintiff also instituted an action under section 66 of the Primary Court Procedure Act in the Primary Court of Akkaraipattu. The Primary Court advised the 1st Plaintiff to seek civil remedy and ordered the 1st Defendant not to erect any building on the said land and the Plaintiff instituted *rei -vindicatio* action in the District Court of Kalmunai praying for declaration of title and ejectment of defendant and damages and cost.

After trial, the learned District Judge entered the judgment on 08.11.2000 declaring the plaintiff is entitled to the land morefully described

in schedule **B** to the plaint and ejectment of the defendant and all others from the said portion of the land.

Therefore, damages and cost prayed for him in the plaint, the Defendant preferred this appeal against the said judgment. The following admissions are recorded at the commencement of the trial in the District Court (Kalmunai).

a. The property described in schedule **A** in the plaint was in possession of Vithanagamage Premawathy alias Kusumawathy Jayawickrema and Dhanapala Jayawickrema initially.

b. By Deed of partition bearing No.3021 dated 30.03.1984 Vithanagamage Premawathy became the owner of the divided northern portion of property described in schedule **B**.

c. The case bearing No. 15683 was between the 1st Plaintiff and the 1st Defendant at the Primary Court of Akkaraipattu in connection with this land.

d. Possession of the land was granted to the 1st Defendant in accordance with the judgment delivered in the Primary Court of Akkaraipattu in case bearing No. 15683 on 06.12.1994.

The Defendant stated in his evidence that Kusumawathy and the 1st Defendant maintained a cordial relationship between them and owned and possessed their respective lots without any dispute until 1987 in which year the said Kusumawathy died due to shooting incident in a bus by the LTTE Terrorists. After the death of said Kusumawathy, her children 1st to 10th Plaintiffs in this case became entitled to the said land.

The 4th Defendant admitted in his evidence that up to the time of the Plaintiffs' mother and also the 1st Plaintiff under cross-examination stated that he made a complaint in respect of the land in dispute to the police station in August 1994. And before this date he did not make any complaint against the 1st Defendant. This evidence is not contradicted and at page 52 of the brief emphasis and also it is to be noted that the 1st Defendant is the uncle of the 1st to 10th Plaintiffs without any crime or reason and for the first time in the 1st week of August 1994 tried to put up a boutique on the land in dispute and thereby prevented the plaintiffs from process in the said land in which disaster in proceedings initiated under Section 66 of the Primary Court Procedure Act in the Primary Court of Akkaraipattu and the 1st Plaintiff was advised to file a civil action to indicate his rights to the said land.

Then the action of declaration of title to the land by the Plaintiff for the ejectment of the defendant was initiated. The title of the ownership for the Plaintiff's land in dispute has been admitted by the Defendant without any dispute.

The case was proceeded to trail for the following issues,

Issue No.3

Whether the Plaintiff become entitled to the land described in schedule **B** (Northern side) by deed of partition No.3021

Issue No.6

Whether the Plaintiffs are entitled to reliefs as prayed for in the plaint?

Issue No.7

Whether the Defendants had prescribed to the land morefully described in schedule **A** including **B**.

Issue No.8

In that case whether the Plaintiff's action has to be dismissed?

The only question that was placed before this Court is whether the Defendant has continuous prescriptive possession of 10 years as claimed by them against the title of the Plaintiff from a certain date.

Issue No. 7 refers the continuous, uninterrupted, undisturbed and unencumbered possession of the said land described in schedule **A** to the plaint including schedule **B** to the plaint for more than 10 years.

When an issue relating to the adverse, possession over 10 years is raised by a defendant as against the legal title of the Plaintiff is an important requirement in law that he must prove his 10 years period commence to run. If this is not clearly proved in his statement that he has 10 years period, is liable to be rejected.

In the case of **Dingiri Appu V. Mohotti 68 NLR page 40** Basnayake CJ held inter alia that *" Where a land is owned in common, there must be clear evidence of ouster of all the other co-owners, by the c-owner who claims that he enjoyed the land exclusively without recognizing the rights of others"*

In the case of **Wickremaratne and Another V. Alpenis Perera -SLR 190, Vol. 1 1986** Chief Justice G.P.S. de Silva 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 successors 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 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."

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 of 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.

And also in the case of **Ponnambalam V. Waidyalingam and others** 1978/1979 2 SLR pg. 166 Ranasinghe J. in his land mark judgment observed as follows:

> *"the termination of common ownership without the express consent of all other co-owners could take place where one or more parties either a complete stranger or even one who is in the pedigree claim that they have prescribed to either the entity or specific portion of common land such a termination could taken place only on the basis of unbroken and uninterrupted and adverse possession by such claim and or claimants at least 10 years the emphasis mine"*

In the above mentioned case there is no evidence that the defendant's possession commences from 1984. There is evidence that up to 1984 the Plaintiff's mother has been in exclusive possession of the said land in 1987 or Sinhalese people in Pothuvil including the Defendant's family equated in some safe areas due to terrorists attack and returned only in the later part of 1993. So, between 1983 and 1993 the Defendant could not possess in this land.

It is also admitted that all parties in this case are living in Pothuvil and the land in dispute also situated in Pothuvil.

Therefore, there was no dispute until 1987 and only in August 1994 , the dispute arose for the first time. Before 1994 there was no problem between families of Plaintiff and the Defendant and they lived in friendly manner and in visiting terms.

If there had been any dispute existed over this land before 1994 the Plaintiffs might have gone to the Police or Court as they did now. Therefore, it is clearly established that the dispute arose only in August 1994 when the Defendants started to construct the building in the Plaintiffs' land.

This fact is admitted by the 4th Defendant in his evidence. In the evidence of the 4th Defendant he has testified that "only in August 1994 the dispute arose between my father and the 1st Plaintiff. When the Plaintiffs' mother died we all lived happily. In 1984, the full land was divided between my father and the aunt, which my father had admitted".

Therefore, evidence of the 4th Defendant and the 1st Plaintiff is very important in the connection with the 10 years prescriptive title.

According to the evidence led in this case, the land in questioned is a bare land with 11 coconut trees standing thereon. It is situated at a short distance from the place where the 1st Plaintiff lives. But it is situated adjacent to the Defendants' land. It is easy to pluck some coconut on the slight without the knowledge of the Plaintiff the occasional secret plucking of the coconut from the Plaintiffs' land.

According to the decided cases of **Corea V, Iseris Appuhamy 15 NLR 65, Wickramaratne and another V. Alpenis Perera -SLR -190, Vol.1 of 1986** it is to be noted that the evidence without any details with the people possessed the land is insufficient to satisfy that there was a possession of the meaning of Section 3 of the Prescription Ordinance.

And also in the cases of **Romanis V. Siwethappu 68 CLR, 40, Hassan V. Romanishamy 66 CLW 112,** Basanayake CJ said that a mere statement of a witness I possess the land or we possessed the land and I planted bushes and also vegetables are not sufficient to entitle him to a decree under Section 3 of the Prescription Ordinance.

The learned trial judge in his judgment has taken into consideration the fact of goodwill and the friendly relationship prevailed between the two families prior to 1987. It that to be so, adverse possession of the Plaintiffs' land by the Defendants and that only the Defendants try to

construct the boutique in August 1994 dispute arose and therefore the Defendants would not have the 10 years possession against the Plaintiffs. For the above reasons the appeal is dismissed with costs.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL