

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

- 1) Balavedage Aques Amaraweera,
No.30, Hospital Road,
Aluthgama.

1st Defendant Appellant.

-Vs-

Case No: CA 833/99(F)

District Court Kalutara No. 6239/P

Egodage Karunawathie,
No.337/P Watugedara.
Ambalangoda.

Plaintiff Respondent.

- 2) Mihindukulasuriya Warnapetige
Peter Dominic Silva
- 3) Mihindukulasuriya Warnapetige
Mary Emilda Silva bothe of
Hospital Road, Aluthgama.
- 4) Balavedage Freeda Jayanthi
Amaraweera, of "Hiroma",
Dikwella.
- 5) Balavedage Victor Amaraweera,
Ambagahawatte, Welipitiya,
Dharga Town.
- 6) Balavedage Aque Graetian
Amaraweera, Near post office,
Padagoda, Beruwala.

Defendant Respondents.

Before : **M.M.A.Gaffoor,J.**

Counsel : Anura Gunarathna for the Defendant-Appellant
Rohan Sahanandu P.C. for the Plaintiff-Respondent.
Yasas de Silva for the Defendant-Respondent.

Written submissions

Filed on : 1st Defendant- Appellant filed on 24/10/2017
Plaintiff-Respondent filed on 04/12/2017
Defendant-Respondent filed on 04/12/2017

Decided on : 18.06.2018

M.M.A.Gaffoor,J.

The Plaintiff instituted the above styled of action for the partition of the land called Thanigahawate alias Ekagahawatte depicted in Plan No. 564/ dated 11/04/1994. According to the schedule to the amended plaint dated 14/03/1997, as described in the Plan Number 564 marked X and the extent of land sought to be partitioned is 1 Rood and 6.2 perches. The plaintiff further stated that as per plan No.564 the lot A and B in extent of Rood 1 and 6.2 Parches is the land to be partitioned and Lots C and D in plan No. 564 are parts of the adjoining land depicted in plan No. 486

prepared by Peter G. Dias L.S. The said Plan No.486 was filed in D.C.Kalutara Case No. 30208 and which is a superimposed Plan when preparing the aforesaid Plan No.564 marked X. According to the amended plaint the plaintiff stated that the original owners were namely, Weerasuriya Jayawardena, Sembakuttipatabendige Poralanthin Silva was entitled to 1/9 share by deed No.23795 dated 2/10/1945. Pinhena Naidinage Raslin de Silva was entitled to 7/9th share by deed No. 1902 and Weerakonda Arachchige Bastian Silva was entitled to 1/9th share by deed No. 8510 dated 3/3/1919 of the land sought to be partitioned. The aforesaid Weerasuriaya Jayawardena Sembakutti Patabendige Porlanthin Silva has gifted the 1/9 share to one K.B. Bastian Silva by deed No.1098 dated 09/01/1941 marked P1. After demise of the said Bastian, the children of Bastian namely (Mariya de Silva, Peter de Silva , Richard de Silva and Jane de Silva) had transferred same to one Hendrick Silva by deed No. 42799 marked P2. The aforesaid Hendrick Silva died leaving Sarojini Silva, the daughter, whose right had been transferred to one Upasena Fernando by deed No.461 and the said Upasena Fernando has transferred same to the plaintiff by deed No.377 dated 02/6/1991. The Plaintiff further stated that Deed No.2447 dated 26/4/1979 marked as P6 is a deed given by Roslin de Silva to Agnes Amaraweera, the 1st defendant and deals with the 7/9 share of the soil rights of the corpus sought to be partitioned. The balance 1/9 share belonged to Bastian Silva who transferred

same to one Martin H. Sebius by Deed No.37704 dated 22.07.1952 marked as P9 who is the father of the 2nd and 3rd Defendants.

Accordingly the shares were as follows.

The Plaintiff	1/9 share
The 1 st Defendant	7/9 share
2 nd and 3 rd Defendant s	1/9 share

The Plaintiff further states that he and his predecessors have prescribed to the land to be partitioned for over 10 years. The 1st defendant, claimed Lots A,C and D by long prescriptive possession, and the 2nd Defendant claimed the plantation by right of inheritance in Lot A with the 1st Defendant. According to the surveyor's report marked X1, the Plantation in lot A was claimed by the 1st and the 2nd Defendants.

The learned District Judge held with the plaintiff holding that Lot A and B are entitled to the corpus and excluded the Lot C and D depicted in Plan marked X, accordingly 1/9 share was granted to the plaintiff, 7/9 share was granted to the 1st defendant and 1/9 share was granted to 2nd and 3rd defendants.

The 1st defendant-Appellant preferred this appeal against the said judgment. According to the issues and the pleadings the 1st defendant-respondent supposed to have possessed Lots A, B and C as one land in lieu of 7/9 share although the Deed was written by 7/9 share in 1979, if

Roslin de Silva, the 1st Defendant's mother possessed the entire land she could have written by deed for the entire land in 1979. This is the position that the 1st defendant could not explain in her statement of claim, this shows that the 1st Defendant was aware of the co-owners. In the evidence of the 1st Defendant, he has admitted the fact that Hendrike Silva and Bastian Silva were entitled to 1/9 share of the land to be partitioned but stated that they never possessed the same, but on perusal of the answer marked P 10 filed in the District Court of Kalutara Case No.3043/L . The 1st defendant and the 4th Defendant it very clearly shows that they were aware of this fact and they have conceded the right of Hendrick Silva. According to the above mentioned case, paragraph 6 clearly demonstrate that the prescriptive claimed by contesting defendants of the rights of Hendrick Silva was not true as per the paragraph 6 (v). The said Hendrick Silva died without leaving children. The 2nd defendant- Rosalin Silva (4th defendant in this case) inherited the said rights from Hendrick Silva. And also when the answer was filed in 1987 by the said Rosalin Silva, the 4th defendant in this case who is the mother of the 1st Defendant, she did not claim Hendrick Silva's right by prescriptive possession but by inheritance, as an heir of Hendrick Silva because Hendrick Silva did not have children. But after it was brought to the notice of Court that the said Hendirck Silva died leaving his daughter Sarojini Silva claimed and claimed inherited rights and prescriptive possession.

It is submitted by Counsel for the Plaintiff- Respondent that the 1st defendant did not produced any deeds, though she pleaded Deeds in her answer. In her evidence dated 8/5/1998, the 1st defendant had no answer to give as to why she has not produced any deeds to prove her rights. In cross examination about the fact that the 1st defendant is entitled only for 7/9 share, she did not give any answer to the fact that the 1st defendant is entitled only for 7/9 share and she admitted that 2nd and 3rd defendants are entitled to this land in question. And also when the 1st defendant was confronted with her answer marked P10 and P10 A, she had no answer to give and she remained silent, and also in her cross examination the 1st defendant had admitted the plaintiff's pedigree and 7/9 shares given to her.

The Learned District Judge had very clearly held in his judgment that the 1st defendant had failed to prove prescriptive title to the entire land and no clear evidence to show that the 1st defendant has proved that the 1st defendant has possessed the entire land as she pleaded, but it is proved that the 1st defendant is entitled only 7/9 share as a co-owners to the lands to be partitioned.

In the case of Korea Vs Iseris Appuhamy 1911 15 NLR page 65 held;

- a) A co - owner's possession is in law the possession of other Co-owner

- b) The every Co – Owner is presume to be possession in his capacity as a co –owner.
- c) That it is not possible for the co-owner to put an end to the Possession as a co-owner by secret intention in his mind.
- c) That nothing short of ouster or some equalant was could bring about that result.

Even in the case of *Ponnambalam Vs. Vithalingam and another* Ranasinghe,J. emphasized the termination of the common ownership without express consent of all co-owners could take place where one or more party is either or complete stranger or even one who is in the pedigree claimed that they have prescribe to either entirety or specific portion of a common land such a termination could take place only on the basic of unbroken and uninterrupted at adverse position by such claimant or at least period of 10 years the within the empersized mined.

The case of *Sirajudeen and others Vs. Abbas (1994) 2 Sri L.R.365* it was 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 his or her acquisition of prescriptive rights.

The 1st defendant had admitted the titled and the co-ownership to the land and therefore he has no rights to what so ever to challenged it. And also the 1st defendant-appellant had not produced any independent material or witnesses or in her buttress and in her amended statement of claimed dated 10/7/1997 she has admitted paragraphs 2,3, and 4 of amended dated 14/3/1997.

In addition to that at the cross examination at the trial she has admitted the title set out in the paint as well as co-ownership of the subject matter.

ප්‍ර : තමා දන්තවද විරකෝන් ආරච්චිගේ බස්නිත් සිල්වාට 1/9 ක් තිබෙන බව දන්තවාද, ඒ කියන්නේ එයාලගේ අයිතිය විකුණා තිබෙනවා මාර්ටින් සිල්වාට, එයාගේ දරුවන් තමා 2, 3 විත්තිකරුවන් ඔවුන්ගේ නම් බොමිනික් සිල්වා, එම්ලේඩා සිල්වා, 2, 3 විත්තිකරුවන්ට අයිතිවාසිකම් තිබෙනවා මෙම ඉඩමේ?

උ : ඔව්.

ප්‍ර : ඒක තමාගේ හිමිකම් ප්‍රකාශයේ තමා සඳහන් කළා?

උ : ඔව්.

ප්‍ර : ඒ බස්නිත් සිල්වා කියන එක්කෙනාට 1919 මාර්තු මස 3 වන දින අංක 8510 දරණ ඔප්පුවෙන් 1/9 පංගුවක් ලැබුණා. එම ඔප්පුව මම පැරි වශයෙන් ලකුණු කරනවා. ඉස්කියන් සිල්වා 1/9 ක් 1952 ජූලි 30 වන දින අංක පැරි ඔප්පුවෙන් එවසේබියස් සිල්වාට විකුණා තිබුණා.

උ : ඔව්.

ප්‍ර : එම අයිතිය තමා 2, 3 විත්තිකරුවන්ට එවසේබියස්ගේ උරුමයට ලැබුණේ?

- උ : ඔව්.
- ප්‍ර : ප්‍රශ්නය තමා දන්නවාද හෙන්රික් සිල්වාගේ අයිතිවාසිකම් තමාලා බුක්ති විඳිනවා කියා තමා කිවාද?
- උ : උත්තරයක් නැත.
- ප්‍ර : හෙන්රික් සිල්වාට 1/9 ක් හිමිවී තිබෙන බව තමා පිළිගන්නවා. ඔප්පුවකින් අයිතිවාසිකම අරන් තිබෙන බව පිළිගන්නවා.
- උ : ඔව්.
- ප්‍ර : තමා මෙම ඉඩමේ හවුල් අයිතිකාරියක් තමාට තිබුණේ 7/9 යි.
- උ : ඔව්.
- ප්‍ර : ඒ 7/9 තමා ඉල්ලන්නේ
- උ : ඔව්.
- ප්‍ර : 1/9 ක් තියෙනවා 2, 3 විත්තිකරුවන්ටත්. එය පිළිගන්නවාද තමා?
- උ : ඔව්.

(vide page 171 and 172 of the brief)

- ප්‍ර : L3043 නඩුවට තමා උත්තරයක් දැමීමා කීවා. එම උත්තරය මා ලකුණු කරනවා පැ10 වශයෙන්
- ප්‍ර : එම නඩුවේදී තමා උත්තරයක් දැමීමා 1984.04.30 පාර ඉල්ලන නඩුවේදී තමා උත්තරයක් දැමීමා 1987.04.30 ඇගයීම් අමරවීර කියන්නේ තමා?
- උ : ඔව්.

ප්‍ර : රැස්ලින් සිල්වා කියන්නේ මව?

උ : ඔව්.

ප්‍ර : දෙදෙනාම ඉදිරිපත් කල උත්තරය, එම උත්තරයේ 5,6 ඡේදවල මෙසේ කියා තිබෙනවා..... හෙන්දික් විවාහයෙන් දරුවන් නැතිව නැසීගියෙන් එම අයිතිවාසිකම් 2 වන විත්තිකාරියට හිමිව තිබෙන නිසා 2 වන විත්තිකාරියට එම අයිතිවාසිකම් හිමිව ඇත කියා තිබෙනවා. එම නිසා තිබෙන සාක්ෂිය අනුව පැ 1 සඳහන් බස්තියන් සිල්වාගේ දරුවන් 4 දෙනෙක් සිටියා.....

(vide page 173, 174 and 175 of the brief)

ප්‍ර : මා යෝජනා කරනවා තමාට, තමාට මෙම ඉඩමෙන් අයිතිවන්නේ 7/9 යි. 1/9 ක් හිමිවන්නේ 2, 3 විත්තිකරුවන්ට?

උ : ඔව්.

ප්‍ර : ඉතිරි 1/9 පංගුවක් හිමිවන්නා ඕනේ පැමිණිලිකරුට

උ : උත්තරයක් නැත.

ප්‍ර : දෙදෙනා ඉදිරිපත් කල උත්තරය, එම උත්තරයේ 5,6 ඡේදවල මෙසේ කියා තිබෙනවා.... හෙන්දික් විවාහයෙන් දරුවන් නැතිව නැසීගියෙන් එම අයිතිවාසිකම් 2 වන විත්තිකාරියට හිමිව තිබෙන නිසා 2 වන විත්තිකාරියට එම අයිතිවාසිකම් හිමිව ඇත කියා තිබෙනවා. එම නිසා තිබෙන සාක්ෂිය අනුව පැ1 සඳහන් බස්තියන් සිල්වාගේ දරුවන් 4 දෙනෙක් සිටියා....

(vide page 177 and 178 of the brief)

For the foregoing reasons I see no reason to interfere with the judgment of the learned District Judge dated 15/09/1999. I affirm the judgment and dismiss the appeal without costs.

JUDGE OF THE COURT OF APPEAL