IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

C.A. No. 841/97 (F)

D.C. Panadura No. 18725/P

Abdul Jaleel Mohammed

Munawwar

No. 179, Galle Road, Paraththa,

Moratuwa

Substitued-Plaintiff-Appellant

Vs

1. Mohammed Mahmood Sadikeen

   No. 2, Yonaka Mawatha,

   Keselwatta,

   Panadura.

2. Ahamadu Ali Sithy Subeida

   No. 31, Sri Jina Mawatha,
   Keselwatta, Panadura

3. Ahamadu Ali Umma Afira

   No. 268, Egoda Uyana,

   Moratuwa

4. Mohammed Shariff Lebei
   Seinamadu
   No. 25, Sri Jina Mawatha,
   Keselwatta,
   Panadura
5. Muhammadu Haniffa Marikkar
   Mohammed Upa
   No. 25, Sri Jina Mawatha,
   Keselwatta,
   Panadura
6. Mohammed Yusuf Mohammed
   Baseer
   No. 1/24, Yonaka Mawatha,
   Keselwatta,
   Panadura
7. Mohammed Usuf Mohammed
   Muzammil
   No. 1/24, Palliya Road, Gorakana
   Moratuwa
8. Mohammed Usuf Mohammed
   Sameem
   Bolgahawatta, Athulugama,
   Bandaragama

Defendant-Respondents

C.A. No. 841/97 (F) **D.C. Panadura No. 18725/P**

Before : M.M.A. Gaffor, J and
Janak De Silva, J

Counsel : Saliya Pieris P.C. with Pasindu Thilakarathna for the Substituted-Plaintiff-Appellant.

Manohara De Silva PC with I. Abeysinghe for the 4th & 5th Defendant-Respondents.

Written Submission filed on : Substituted-Plaintiff-Appellant filed on 30/01/2018

4th & 5th Defendant-Respondents filed on 02/2/2018

Argued on : 09/8/2017

Decided on : 02/07/2018

M.M.A. Gaffoor, J.

This is an appeal from the judgment of the Learned District Judge of Panadura in respect of a partition action Number P 18725.

The original Plaintiff Mohammed Marikkar Abdul Jaleel instituted this action seeking to partition the land called "Gala Udawatta" described in the schedule to the plaint and depicted in Plan Number 1875 dated 27.02.1985 made by Y.B.K. Costa Licensed Surveyor.

And the original Plaintiff relied upon the pedigree which has set out in the plaint.

According to the original Plaintiff's pedigree and undivided 1/3 share originally belonged to Awl Lebbe Marikkar Kasi Lebbe Marikkar and the balance undivided 2/3 original Plaintiff share was originally owned by Hadji Marlkkar Mohammed Haniffa and from the original owners shares devolved in the manner set out in the Plaint.

The substituted-Plaintiff had been substituted after the demise of the original Plaintiff. According to the plaint the undivided shares of the land to be partitioned devolve on the parties as follow;

Plaintiff to an undivided share of	1/6
1st defendant to an undivided share of	2/6
2nd and 3rd defendants to an undivided share of	2/6

4th defendant to an undivided share of 1/6

And the 4th and 5th defendants admitted the plaintiff's narration of the chain of title in the paragraph 01-18 of the plaint but claim to the Lot depicted as 'R' in Sinhalese in the preliminary plan marked as 'X' and the 4th defendant is entitled to all the building therein.

It is noted that there was no contest regarding the corpus depicted as lot ඝ ඟ ඉ and ඓ.

But the contest was regarding the devolution of title and how the buildings standing in the particular 'Gala Udawatta' should be allocated to the parties.

Further 5th defendant claims the prescriptive possession and evidenced that he had possessed the middle lot 'R' in Sinhalese and for a period over fourty years, whereas the plaintiff did not have proper possession and also the 5th defendant stated that he had built a house in 1952, which has been supported by the documents and assessment register of the local authority.

Upon the conclusion of trial the learned District Jude of Panadura dismissed the action and took up a position that the 4th and 5th

defendants are entitled to Lot "R" along with the buildings and cultivation thereon. The learned District Judge of Panadura also held that the plaintiff has not been proved his stance.

The substituted-Plaintiff- Appellant being dissatisfied with the judgment of the leaner District Judge of Panduara appealed and prayed to set aside the judgment of the learned District Judge of Panadura one among the ground stating that the learned District Judge of Panduara has failed to give reasons and failed to evaluate the evidence correctly and as a result he has misdirected himself on the law and facts.

It is important to identify that whether the 4th and 5th defendants have possessed and entitled to lot "R" along with the building and cultivation thereon.

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 a 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.*********

But the 4th and 5th defendants argued that the 5th defendant has occupied the house adverse to the title of any other and have acquired prescriptive rights to the same.

In Sirajudeen and Two Others V.Abbas (1994) 2 SLR 365 the Supreme Court has observed thus:

'As regards to the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prospective 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 provide 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 Corea Vs Iseris Appuhamy (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.

Wickremaratne And Anothers Vs. Alpenis Perera1986 1 SLR 190 held that, in a partition action for a lot of land claimed by the plaintiff to be 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 the alleged dividing off it will militate against the plea of prescription. Possession of divided portions by different co-owners is in no way in consistent with common possession.

A co – owner's possession is in law the possession of other co-owners very co-owners 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 the result.

It is noted that the contention of the 4th and 5th defendants was that they are entitled to the Lot "R" and the 5th defendant build a house in that said Lot and thus the said lot been prescribe by them and 5th defendant admitted in his evidence that the plaintiff gave money to build the house which they had been in possession.

The substituted plaintiff and that his father who was the original plaintiff and his uncle who was the 5th defendant, built the house together and carried out a business as well. The 4th defendant who was the wife of the 5th defendant.

In ***Chelliah Vs. Wijendran 54 NLR 337 at 342 Gratien J*** observed " whereas 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 fairly and squarely on him to establish the starting point of his or her acquisition of prescriptive rights".

Justice Janak de Silva in Muaththananda Ponnamperumage Dhanayake Vs. Nanayakkaravasam and Other C.A. 1340/99 F observed that in our society family relationships are considered important and attracts a certain degree of trust. A family member is trusted more than an outsider. Courts appear to have taken this into consideration on the question of adverse possession in a claim of prescriptive title.

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 in 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 claimed to be so as of right as against the true owner. Where there is no hostility to a 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 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 presumption represents 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 presumption will be that the enjoyment of the son was on behalf of and with the permission 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 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 the 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."

In view of **Maria Fernando & Others V. Anthony Fernando (1997)2 SLR 356** Court of Appeal held that,

"Long possession, payment of rates and taxes enjoyment of produce, filling suit without making the adverse party a party, preparing a plan and building house on land renting it are not enough to establish prescription among co-owners in the

absence of an over act of ouster. A secret intention to prescribe may not amount to ouster."

Also in Dias Abeysinghe 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 in possession thereof for over ten years, he does not acquire 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 establish prescriptive title against other co-owners.

The learned district judge of Panadura was misdirected himself in deciding the building constructed by the 5th defendant and failed to consider the family relationship among the parties in order to decide the adverse possession under prescriptive title.

It is submitted by the Plaintiff-Appellant that no reasons have been given at all by the learned district judge as to why he accepted the evidence on behalf of the 4th and 5th defendants and rejected the evidence on behalf of the Plaintiff and moreover he has failed to give reasons as to why he had come to the above findings. And also he has failed to appreciate the identity of this original Plaintiff Abdul Jaleel by carefully examining the documents produced at the Trial.

In **Dona Lucihamy Vs 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 Vs.Ramani Jayawardena (1990) 1 Sri L R 206** stated that evidence germane to each issue must be reviewed or examined.

In Sopinona Vs Pitipanaarachchi (2010) 1 Sri L R 88 observed that answering only points of contest raised by one party in a partition action and 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 Ponnamperumage Dhanayaka Vs Nanayakaravasam and Ohters CA 1340/99F further stated that 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 the 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 of Panadura had erred in his conclusion and it is noted that the shares should be done according to the pedigree which had been submitted and annexed in the plaint and the 4th and 5th

defendants had failed to prove their adverse possession to establish the prescriptive title to the Lot 'R' and its buildings, cultivations thereon in accordance with the settled law.

For the foregoing reasons, I set aside the judgment of the learned district judge of Panadura delivered in 20/11/1996 and allow the appeal in favour of the Plaintiff.

JUDGE OF COURT OF APPEAL

Janak De Silva, J

I agree.

JUDGE OF COURT OF APPEAL