

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

An application made by way of appeal made  
against the judgment of the Kuliypitiya  
District Court case No. 9691/P

**C.A. Application No.CA 26/99 (F)**

**District Court of Kuliypitiya**

**Case No. 9691/P**

Herath Mudiyansele Dingiri Amma  
Ihala Nelibewa,  
Moragane.

**2<sup>nd</sup> Defendant-Appellant**

**Vs**

**Herath Mudiyansele Manikhamy**  
*((deceased))*

Ihala Nelibewa,  
Moragane.

**Plaintiff-Respondent**

**Herath Mudiyansele Sirisena,**

Ihala Nelibewa,  
Moragane.

**Substituted Plaintiff-Respondent**

1. Herath Mudiyansele Ukkumenika  
(deceased),

**1st Defendee-Respondent**

**1A. Genasekara**

Ihala Nekibewa,  
Moragane.

**Substituted 1A Defendant-Respondent**

3. Tennakone Mudiyansele Ariyawathie  
(deceased)

**3rd Defendant-Respondent**

**3A. Rathnayake Mudiyansele Rathnawathie  
Menike**

**Substituted 3A Defendant-Respondent**

**3B. Rathnayake Mudiyansele Seelawathie**

**Substituted 3B Defendant-Respondent**

4. Rathnayaka Mudiyansele Rathnawathie

**4th Defendant-Respondent**

5. Rathnayaka Mudiyansele Seelawathie

**5th Defendant-Respondent**

6. Marasinghe Arachchilage Kiribanda  
(deceased)

**6A. Genathilake**

**Substituted 6A Defendant-Respondent**

**6B.** Piyadasa

**Substituted 6B Defendant-Respondent**

**6C.** Nandawathi Kumarihami

**Substituted 6C Defendant-Respondent**

**6D.** Karunawathi

**Substituted 6D Defendant-Respondent**

**6E.** Hemawathi

**Substituted 6E Defendant-Respondent**

All of Ihala Nelibewa,

Moragane.

**C.A. No. 26/99(F)**

**D.C. Kuliypitiya No.9691/P**

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

**Counsel** : Chula Bandara for the 2<sup>nd</sup> Defendant-Appellant.  
M.C.Jayarathne with M.D.J. Bandara for the 3(a),  
3(b), 4<sup>th</sup> and 5<sup>th</sup> Defendant-Respondant.

**Written Submission filed on :**

2<sup>nd</sup> Defendant-Appellant filed on  
03.05.2017

3(a), 3(b), 4th & 5th Defendant-  
Respondents filed on 02.04.2018

**Decided on**

: 23.07.2018

**M.M.A. Gaffoor, J**

This is an appeal from the judgment of the Learned Additional District Judge of Kuliypitiya in respect of a partition action Number 9691/P. The Plaintiffs instituted this action seeking to partition the land called "Bilingahamulawatta" depicted in Plan Number 173C dated 16.12.1990 made by G.S.Gorongahagoda Licensed Surveyor marked as "X" and produced and file of record. There was no contest regarding the corpus, the original owner and the undivided 2/8 share of the Plaintiff. The 2<sup>nd</sup> Defendant gave evidence at the trial and later on 14.10.1998. The counsel for the 2<sup>nd</sup> and 6A Defendants informed the Court that they withdraw from the contest and to accept undivided shares allotted for them in the Plaintiff of the Plaintiff.

“එකී විත්තිකරුවන් වෙනුවෙන් පෙනී සිටින නීතිඥ ජී.එම්. ජයතිලක මහතා 2 හා 6අ විත්තිකරුවන් වෙනුවෙන් ඉදිරිපත් කර ඇති තරඟය ඉල්ලා අස්කර ගනී පැමිණිල්ලෙන් විත්තිකරුවන්ට දී ඇති කොටස් භාර ගැනීමට එකඟ වන බවත් කියා සිටී.” at Pg. 128

At the end of the trial the learned District Judge delivered his judgment dated 01.02.1998 in favor of the Plaintiff. Being aggrieved by the said judgment that the 2<sup>nd</sup> Defendant appealed to the Court of Appeal seeking,

Set aside the judgment,

That the shares allotted to the 4<sup>th</sup> and 5<sup>th</sup> defendants be deleted.

### **Legal issues.**

#### **1. Prescription among co-owners.**

That the 2<sup>nd</sup> Defendant (Appellant) states that she is in possession of building 'C' in Lot 1 of the land and Lot 3 of the said land for more than ten years and therefore, she has the prescriptive title on the said building and Lot 3 of the land.

In ***Corea v. Iseris Appuhamy*** 15 NLR 65 the Privy Council held that the possession of a co-owner was in law, the possession of the other co-owners and thus, not adverse to them. In other words even if one co-owner's possession or the common property or part thereof was of a character incompatible with the title of the other co-owners, yet that co-owner possesses the common property on behalf of all co-owners. It was not possible for him to put an end to the possession by any secret intention in his mind.

In ***Tillekaratne V. Bastian*** 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:

1. Every co-owner has a right to possess and enjoy the whole property and every part of it so that the possession of one co-owner in that capacity is in law, the possession of all.
2. Where the circumstances as 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.
3. A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity.

It is clear that generally a co-owner cannot establish proscriptive title against other co-owners. Thus when a co-owner's possession is not, at its inception adverse and he claims that it has later become adverse, thus onus is on him to prove that possession has become adverse.

He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the other co-owner against whom he sets up his possession.

Referring into the present matter that the 2<sup>nd</sup> Defendant has failed to establish that she has possessed the said Lot 1 and Lot 3 against the other co-owners over considerable period of time.

And no evidence was adduced to establish the defendant's case for prescription.

**2. Whether 4<sup>th</sup> and 5<sup>th</sup> Defendant are entitled to the shares allotted to them?**

- i. Muthu Manika gifted her undivided  $\frac{1}{4}$  share of land to her daughter R.M. Ran Menika upon deed No. 3268 dated 13.10.1959. (marked as 48 1 at pg.129)
- ii. Ran Manika had sold that undivided  $\frac{1}{4}$  share of land to her brother R.M. Kiri Banda upon deed No. 18632 dated 05.07.1966. (marked as 48 2 at pg.129)
- iii. 2<sup>nd</sup> Defendant claims that Muthu Manika had sold her  $\frac{1}{4}$  share of land to her husband M.A. Kiribanda upon deed No. 6448 dated 02.01.1987. ( marked as 68 1 at pg.109. But it is not in the brief)
- iv. Considering aforementioned evidence that Muthu Manika can't transfer her undivided  $\frac{1}{4}$  share of land to M.A. Kiribanda which was already gifted to her daughter without life interest.
- v. Therefore, M.A. Kiribanda can't claim the right of said  $\frac{1}{4}$  share of Muthu Manika's land.

- vi. R.M. Kiri Banda died without a will and his widow Ariyawathi and two daughters namely Ratnawathi and Seelawathie entitled to the said undivided land 1/8 share each.

Considering the aforementioned evidence it is evident that the 2<sup>nd</sup> Defendants case has no merit. The appeal is dismissed without costs.

**JUDGE OF COURT OF APPEAL**