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

D.M.Gunawardena,

Otubewattegedara,Ranwanguhawa,

Kiriwanagama. (Deceased)

1st Defendant-Appellant

Dissanayaka Mudiyanselage Sirisoma

Otumbewattegedara,Ranwanguhawa,

Kirawanagama.

Substituted 1st Defendant-Appellant

Case No. CA 206/99 (F)

D.C.Bandarawela Case No: 154/P

Vs.

S.A.Wijeratne

Karagahawela Vidyalaya,

Bandarawela.

Plaintiff-Respondent

2A.D.M.Munendrasinghe Bandara

Nedumgamuwa,Rajawaka,
Balangoda.

Substituted 2A Defendant-Respondent

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Hemasiri Withanachchi for the Substituted 1st Defendant-Appellant

Nimal Jayasinghe with Anuradha Liyanage for the Plaintiff-Respondent

Written Submissions tendered on:

Substituted 1st Defendant-Appellant on 01.06.2018

Plaintiff-Respondent on 28.06.2017 and 14.02.2018

Argued on: 17.01.2018

Decided on: 11.09.2018

Janak De Silva J.

This is an appeal against the judgment of the learned Additional District Judge of Bandarawela dated 17.02.1999.

The Plaintiff-Respondent (Respondent) filed the above action in the District Court of Bandarawela seeking to partition the land called "Asweddume Mulatha" more fully described in the schedule to the plaint situated at Ranwanguhawegama in the District of Badulla. There was no contest as to the identity of the corpus. It was admitted that the corpus is depicted in plan no. 339 dated 17.02.1986 prepared by U.N.P. Wijeweera, Licensed Surveyor.

The pedigree pleaded by the Respondent was contested by the the 1st Defendant-Appellant (Appellant) while the original 2nd Defendant admitted it.

The Respondent alleged that the corpus was at one time owned by one Kumarihamy who died intestate and her rights were inherited by one Mullegama Muthubandara. The said Mullegama Muthubandara died intestate and his rights were inherited by one Loku Kumarihamy. The pedigree of the Respondent is admitted by the Appellant up to this point of time.

The divergence arises on the number of children of Loku Kumarihamy. The Appellant contends that there were only two, namely Loku Kumarihamy (2nd Kumarihamy) and Heen Kumarihamy and that he bought the corpus from them by virtue of deed no. 45801 dated 26.07.1961 (වි.1).

However, the Respondent contends that Kumarihamy died intestate leaving five children, namely 2nd Kumarihamy, Madduma Kumarihamy, Heen Kumarihamy, Punchi Kumarihamy and Podi Kumarihamy who each inherited an undivided 1/5th share of the corpus. The Respondent further submits that the 2nd Kumarihamy died intestate leaving two children namely D.M. Jinadasa and D.M.D.D. Bandara (the original 2nd Defendant). D.M. Jinadasa sold his 1/10th share to the Respondent by virtue of deed no. 583 dated 03.11.1973(පැ.2). According to the Respondent the undivided shares of Madduma Kumarihamy and Heen Kumarihamy devolved on D.M. Gunawardena (the original 1st Defendant) who thereby became entitled to an undivided 4/10th of a share of the corpus. Punchi Kumarihamy sold her undivided 1/5th share of the corpus to the Respondent by virtue of deed no. 583 dated 03.11.1973(පැ.2). Podi Kumarihamy died intestate and her undivided 1/5th share was inherited by S.M. Seneviratne who by virtue of deed no. 636 dated 20.11.1973 (පැ.3) transferred his share to the Respondent.

Accordingly, the case of the Respondent was that the shares of the corpus was held as follows:

Respondent	an undivided 5/10 share
1st Defendant-Appellant	an undivided 4/10 share
Original 2nd Defendant	an undivided 1/10 share

The Respondent pleaded only paper title whereas the Appellant pleaded both paper and prescriptive title.

The learned Additional District Judge held that the Respondent had established the pedigree pleaded and ordered that the corpus be partitioned accordingly. Hence this appeal by the Appellant.

Th case of the Appellant is that he is the sole owner of the corpus. One important matter to be determined in this context is whether Loku Kumarihmay had only two daughters, as pleaded by the Appellant or five as pleaded by the Respondent. The evidence of Mattamagoda Sumanasekera, son of Heen Kumarihamy is significant on this issue. He testified that his mother had four sisters. The Appellant was unable to contradict this statement.

Another important matter was whether deed no. 45801 dated 26.07.1961 (වි.1) is valid as the entire claim of the Appellant is based on this deed. The Respondent attacked the validity of this deed on the basis that the 2nd Loku Kumarihamy, one of the vendors of deed no. 45801 dated 26.07.1961 (වි.1), died on 27.08.1943. The Respondent submitted the death certificate of the 2nd Loku Kumarihamy (පැ.6). The Appellant was unable to controvert this position. Accordingly, the learned Additional District Judge correctly concluded that the deed no. 45801 dated 26.07.1961 (වි.1) did not transfer ownership of the corpus to the Appellant as claimed by him.

The learned counsel for the Appellant however submits that the learned Additional District Judge erred in not considering that the Appellant had, in addition to the paper title, also pleaded prescriptive title which has received negligible if not no consideration at all. There is some merit in this submission. However, the proviso to Article 138(1) of the Constitution states that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. Therefore, even where there is a failure to satisfactorily consider the claim of prescriptive title pleaded by the Appellant, if it is evident on a close examination of the totality of the evidence that the learned Additional District Judge was correct in pronouncing judgment in favour of the Respondent, there is no prejudice to the substantial rights of the parties or occasioned a failure of justice and the judgment of the learned Additional District Judge should not be disturbed [*Victor and Another v. Cyril De Silva* (1998) 1 Sri.L.R. 41].

The position of the Appellant is that they were in possession of the corpus from the time deed no. 45801 dated 26.07.1961 (වි.1) was executed in 1961. The evidence is that when this deed was executed in 1961, one Heen Menika was working on the paddy field forming the corpus of the partition action. She happened to be an aunt of the Appellant. In fact, the wife of the Appellant admitted that Heen Menika was working the paddy field from 1952 to 1961.

In *D.R. Kiriamma v. J.A. Podibanda and 8 others* (2005 B.L.J. 9 at 11) Udalagama J. adverted to some important points to be borne in mind in considering a claim of prescriptive title:

> "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. "

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 fairly and squarely on him to establish the starting point for his or her acquisition of prescriptive rights [Gratiaen J. in *Chelliah v. Wijenathan* 54 N.L.R. 337 at 342].

The principles of burden of proof and mode of proof where a party claims prescriptive title was succinctly stated by the Supreme Court in *Sirajudeen and two others v. Abbas* [(1994) 2 Sri.L.R. 365] as follows:

> "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.
>
> A facile story of walking into abandoned premises after the Japanese air raid constitutes material far too slender to found a claim based on prescriptive title.
>
> As regards 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 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."

The Appellant has failed to explain how and when he obtained possession of the corpus from Heen Menika. Thus, he has failed to establish an important element of the burden of proof namely the starting point for his or her acquisition of prescriptive rights.

This failure has further implications in view of the evidence of the Respondent that the Appellant had previously promised to give him his share of the harvest which the Appellant later failed to do. The Respondent further stated that thereafter he went before the Conciliation Board and marked in evidence a certificate issued under section 14 of the Conciliation Boards Act (පැ.4). It states that there was a complaint by S.A. Wijeratne, the Respondent, against D.M. Gunawardena, 1st Defendant-Appellant, that the 1st Defendant-Appellant had failed to give the Respondent the promised ¼ share from the harvest according to the decision of the Productivity Improvement Committee. The Appellant failed to challenge this position in cross-examination of the Respondent. This vital piece of evidence negates the adverse possession that must be established by the Appellant to succeed in the claim to prescriptive title. As the learned Additional District Judge correctly points out the Appellant has failed to explain the circumstances set out in the certificate issued under section 14 of the Conciliation Boards Act (පැ.4).

In *Weragoda v. Peiris and others* [(1996) 2 Sri.L.R. 56] the plaintiff instituted a partition action pleading paper title. The defendants pleaded that they have acquired prescriptive title. The District Court held in favour of the plaintiffs and the defendants appealed. The defendants relied upon two deeds of their predecessors in title by which they were entitled to an undivided 1/3 share each on their "waga buktiya". The Court of Appeal held that "waga buktiya" means that they were claiming to be entitled to a 1/3 share each by virtue of their possession of the Plantation or by virtue of their possession of the undivided 1/3 share each to plant it. In either

case, it acknowledges a right of ownership in some other person or persons and that until such time as they shed that right of limited possession, adverse possession will not commence.

The Appellant relied on several acreage levy receipts to establish prescriptive title.වි.4, වි.6, වි.7 වි.8 and වි.9 are all acreage levy receipts issued after the partition action was filed and the learned Additional District judge correctly did not attach any evidentiary value to them. වි.5 is dated 21.08.1974 but is in relation to a paddy land named "Aswedduma" whereas the corpus is identified as "Asweddume Mulatha".

It was admitted that the corpus is depicted in plan no. 339 dated 17.02.1986 prepared by U.N.P. Wijeweera, Licensed Surveyor. According to this plan the extent of the corpus is A.01 R. 03 P.20. වි.10 is an extract from the paddy lands register 1980 which states that the the Appellant is the owner of the land called "Aswedduma" which is 2 acres in extent. This again is a document emanating after the filing of the partition action and further refers to to a paddy land named "Aswedduma" whereas the corpus is identified as "Asweddume Mulatha". වි.11 is an extract from the paddy lands register 1970 which states that the the Appellant is the owner of the land called "Aswedduma Mulatha" which is 1 acre in extent whereas the corpus is A.01 R. 03 P.20 in extent. In the above circumstances, I am of the view that the Appellant has failed to show by clear and unequivocal evidence that his possession of the corpus was hostile to the real owners and amounted to a denial of their title to the property claimed as required to be shown in view of the decision in *De Silva v. Commissioner General of Inland Revenue* (80 N.L.R. 292).

For the foregoing reasons, the case of the Appellant that he acquired prescriptive title to the whole land must fail.

The case of the Respondent is that the Appellant is only a co-owner who is entitled to an undivided 4/10 share of the corpus. In this context, the plea of prescriptive title raised by the Appellant must be considered upon the applicable legal principles governing claim of prescriptive title amongst co-owners. *A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result* [*Corea v.*

Appuhamy et al (15 N.L.R. 65)]. *A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity. However, such presumption of continuity of common possession can be negative by a counter presumption of ouster.* [*Tillekeratne et al v. Bastian et al* (21 N.L.R. 12)].

The facts of the instant case do not establish an ouster as required by law. The evidence of the Respondent on the certificate issued under section 14 of the Conciliation Boards Act (වි.4) and its background which the Appellant failed to challenge and controvert as well as the failure of the Appellant to point to a starting point for his acquisition of prescriptive rights prevents the application of a counter presumption.

For the foregoing reasons, I see no reason to interfere with the judgment of the learned Additional District Judge of Bandarawela dated 17.02.1999.

The appeal is dismissed with costs.

Judge of the Court of Appeal

<u>M.M.A. Gaffoor J.</u>

I agree.

Judge of the Court of Appeal