IN THE COURT OF APPEAL OF

THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C. A. No. 963/97 (F)

D. C. Kurunagala, Case No. 3264/P

Sooriyaguptha Karunaratne
Bandaranayake Mudiyansalage
Ralahamillage Bandaranayake,

Kaluwalgodawatta,
Kandeniyawala.

PLAINTIFF

VS

1. Hennaka Mudiyanselage
   Wijenayaka
   Ikriwaththa,
   Kanadeniyawala

2. Ekanayaka Mudiyaselage
   Ekanayaka
   Meegasthenna,
   Ambakotte

DEFENDANTS

AND NOW BETWEEN

Sooriyaguptha Karunaratne
Bandaranayake Mudiyansalage
Ralahamillage Bandaranayake,

Kaluwalgodawatta,
Kandeniyawala.

PLAINTIFF-APPELLANT

VS

1. Hennaka Mudiyanselage
   Wijenayaka
   Ikriwaththa,
   Kanadeniyawala

2. Ekanayaka Mudiyaselage
   Ekanayaka
   Meegasthenna,
   Ambakotte

BEFORE : **M. M. A. GAFFOOR, J.**

COUNSEL : S. Wijith Singh with Chandrananda G. Liyanage for the Plaintiff-Appellant

Dineshi Nanayakkara with Amila Perera for the 1st Defendant-Respondent

2nd Defendant-Respondent absent and unrepresented

WRITTEN SUBMISSIONS TENDERED ON : 11.04.2018 (by the Plaintiff-Appellant)
29.06.2018 (by the 1st Defendant-Respondent)

DECIDED ON : **03.12.2018**

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M. M. A GAFFOOR, J.

This is an appeal from the judgment of the Learned District Judge of Kurunagala in respect of a partition action bearing case No. 3264/P.

The Plaintiff-Appellant (hereinafter referred to as the "Appellant") by his Plaint dated 22.03.1989, instituted this action seeking to partition the land situated in Kurunagala District among the parties and also for a Declaration of title to a 7/8 of an undivided portion of the specific land described in the schedule to the plaint.

The Appellant's pedigree has set out that the specific land referred as "Ikkiriwatta Pihiti Muhanthiramwatta" situated at Polgolla. Later found to be an incorrect name and pleaded as "Muhanethirawatta" in Idiriwatta and situated in Kurunegala District We-uda Village, Haenpaththuwa, Mathure Korale (*vide page 39 of the appeal brief*).

The Appellant argued that Ranbanda and Bandaramenike were the original owners of the land in suit (*page 102 of the appeal brief*). Ranbanda had transferred his 1/2 share to Samarakoon Banda and he transferred to Ukku Banda and also Ukku Banda is the son of the other original owner of Bandaramenike who has inherited his mother's share that is 1/4 of undivided share and transferred all his undivided 3/4 to Sirimal Bandaranayake and also Nawarathna Banda who is also another heir of Bandara Menike transferred his 1/8 undivided share to Sirimal Bandaranayake, and through this pedigree the Appellant entitled to undivided 7/8 shares of the land.

The 1st Respondent pleaded that land specified in the schedule to the Plaint was belonged to Dingiri Banda and he is entitled to claim prescriptive title to the land and he and his predecessors possessed the land for more than 10 years.

The 2nd Respondent claimed that he is entitled to undivided 1/4th share of the land. He further stated that Punchi Kumarihami who had inherited undivided 1/4th share from her mother Bandara Menike the original owner and transferred to the 2nd Respondent.

The Learned District Judge of Kurunagala who heard the evidence and in his judgment delivered on 13.08.1997 urged the following grounds that, the parties have failed to prove and identify the land in dispute. The pedigree submitted by the Appellant has not been proved, and the 1st Respondent also failed to prove the prescriptive title and the 2nd Respondent so on and so forth. Finally he dismissed the case (*vide page 102 to 120 of the appeal brief*).

Being aggrieved with the judgment of the learned District Judge, this appeal preferred by the Appellant to set aside the said judgment.

It is to be noted that the land in dispute had been referred in different names. The appellant named the land as "Ikkiriwatta Pihiti Muhanthiramwatta"

situated at Polgolla while the 1st Respondent named the land as "Asgiriye Gedarawatta".

But after the Court Commission Survey Plan No. 528 dated 31.01.1991 (*Survey initially had taken on 14.10.1990 and completed on 31.01.1991*) made by E. M. P. B Boyagoda and the report of the Surveyor, all the parties had admitted the land and the admission also recorded in the case record and I opinioned that the Learned District Judge misdirected himself and erroneously stated that no party had taken steps to prove the land in dispute and but it is clear the parties had identified the land in dispute.

In **THILAGARATNAM vs. ATHPUNATHAN AND OTHERS** [(1996) 2 SLR 66], Ananda Coomaraswamy, J. held that,

> *"...it is the duty of the Court to investigate title in a partition action, but the Court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral. Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them; otherwise parties will tender their pleadings and expect the Court to do their work and their Attorney-at-Law's work for them to get title to those shares in the corpus." (page at 68)*

The Appellant's claim of undivided 7/8 share is only relied upon his pedigree and Deeds of transfer mentioned and marked as P1-P4. According to the evidence led by the Appellant before the learned District Judge, and it is clearly observed that only paper title been transferred to person to person not the actual title of the land and Deed marked as P4 transferred in the year of 1909, and until 1976 there were no possession been established by the owners and no steps been taken to establish them as owners and just had mentioned in the pedigree. The learned District Judge has come to a strong and clear view that the Appellant had failed to prove his title to the land in dispute.

I accept the learned District Judge's decision in regard to the 2nd Respondent, as he also failed to prove the actual title and had not taken any interest or steps to prove his actual title and failed to establish his rights in regard to the land in dispute.

The 1st Respondent's position only depends on the prescriptive title. According to him he claimed that he possess the entire land in dispute since 1940 from his father's time and entitled for prescriptive title. Even the Appellant in his evidence stated that he and the people mentioned in the pedigree did not have any possession to the land in dispute and agreed that the 1st Respondent and his father had possessed for a longer period.

It is settled law that, 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.

According to the provisions of Section 3 of the Prescription Ordinance Act, No 2 of 1889 the claimant must prove the following elements:-

1. Undisturbed and uninterrupted possession
2. Such possession to independent or adverse to the claimant and
3. Then (10) years previous to the bringing of such action.

In **D. R. KIRIAMMA vs. J. A. PODI BANDA AND OTHERS** [2005 BLR at page 09] in order to claim prescriptive title Udalagama, J. observed that,

> *"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."

In **DE SILVA vs. 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 claim to be so as of right as against the true owner**. Where there is no hostility to or 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 had to the animus of the person doing those acts, and this 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 the 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 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."

It is to be noted that the 1st Respondent's possession had been interrupted only on 1976 by the Appellant but he and his father had been possessed and resided in the land since 1940 and the evidence clearly led that the 1st Respondent had born in the same land. So the adverse period will starts from 1940. It is crystal clear that the 1st Respondent's possession to the land in dispute is more than 10 years.

I am of the view that the learned District Judge has failed to consider the evidence led by him about the prescriptive title of the 1st Respondent.

In addition to above, in **TILLEKARATNE vs. BASTIAN** [(1918) 21 NLR 12], Betram, C. J. referring to the real effect of the decision in **COREA vs. ISERIS APPUHAMY** [(1911) 15 NLR 65] 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 principles of law:

1. *Every co-owner having a right to possess and enjoy the whole property and every part of it, the possession of one co-owner in that capacity is in law the possession of all.*

2. *Where the circumstances are 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.*

I observed that the 1st Respondent's adverse title starts from 1940 which already had established the prescriptive title to the 1st Respondent and the interruption caused by the Appellant in 1976 did not forfeit the 1st Respondent's right over land in dispute.

For the foregoing reasons, I dismiss the appeal of the Appellant without cost and I further hold that the 1st Respondent is proved his prescriptive title and entitled to the land in dispute.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL