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

3. Kodippili Thanthirige Livinis,
(deceased)
Weniwelkola,
School Lane,
Polgasowita.

3A. Kodippili Thanthirige Sugath,
No. 72,
Weniwelkola,
School Lane,
Polgasowita.
3A Defendant-Appellant

CASE NO: CA/549/2000/F
DC HOMAGAMA NO: 909/P

Vs.

Kodippili Arachchige Piyasena,
Weniwelkola,
Kebellaowita,
Polgasowita.
Plaintiff-Respondent

1. Kodippili Thanthirige
Chandrawathie,
Weniwelkola,
Kebellaowita,
Polgasowita.

2. Kodippili Thantrilage Somapala,
(deceased)
Weniwelkola,
Kebellaowita,
Polgasowita.

2A. Kodippili Thanthrilage Ratnasiri,
No. 157/5,
Kebellaowita,
Weniwelkola
Polgasowita.

Defendant-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Mahinda Nanayakkara for the 3A Defendant-Appellant.
Vidura Ranawaka for the Plaintiff-Respondent.

Decided on: 04.12.2018

Samayawardhena, J.

The plaintiff filed this action in the District Court of Homagama to partition the land described in the schedule to the plaint (and now depicted in the Preliminary Plan No. 280) among the plaintiff, and the 1st and 2nd defendants. The 3rd defendant was later added as a party to the case.

There was no contest among the plaintiff, and the 1st and 2nd defendants. The only contesting party was the 3rd defendant, who, as crystallized in the issues raised at the trial, sought for the dismissal of the partition action in view of the Judgment entered in the previous case No. 531/L. That was his main contention. Without prejudice to it, the 3rd defendant sought for the exclusion of Lot 1 of the Preliminary Plan on the basis that he has acquired prescriptive title to the said Lot.[1]

After the trial, the learned District Judge by the Judgment dated 22.08.2000 dismissed the claim of the 3rd defendant and partitioned the land among the plaintiff, and the 1st and 2nd defendants. This appeal by the 3rd defendant is from that Judgment.

At the trial, the plaintiff and the 3rd defendant gave evidence. There was no corpus or pedigree dispute. The plaintiff tendered documents marked P1-P7, which included title Deeds to prove devolution of title. There was no contest about marking those title Deeds except to say that some of them were executed after the Judgment in the previous case No. 531/L.

The 3rd defendant tendered documents marked V1-V3. He did not unfold any pedigree. Nor did he mark any title Deeds. In short, he does not claim to be a co-owner of the land. V1 is the statement of objections tendered by the 3rd defendant objecting to the application for interim injunction made by the plaintiff.

[1] Pages 132-133 of the Appeal Brief.

V2 is the corresponding affidavit. V3 is the Plan No. 709 prepared for the previous case No. 531/L.[2]

The only point stressed by the 3rd defendant in his evidence in chief was that the earlier case No. 531/L filed by the plaintiff against him was dismissed after the trial (and therefore the matter is *res judicata*).

During the cross examination the 3rd defendant admitted that he is living about ½ a kilometer away from the land to be partitioned.[3] He also stated that he has title Deeds to this land.[4] But such Deeds were never produced. His standpoint was that he produced the pedigree in the previous case No. 531/L.[5] That means, he admits that he is a co-owner of the land, but now claims title to Lot 1 of the Preliminary Plan on prescription. Nevertheless, he did not give any affirmative evidence on how he prescribed to Lot 1 of the Preliminary Plan and when he started prescriptive possession etc.

Needless to say that proof of prescription is difficult, and proof of prescription by one co-owner against the other co-owners is more difficult.

When a co-owner claims prescriptive possession against other co-owners, proof of undisturbed, uninterrupted, adverse or independent possession for more than 10 years explicitly adverted to in section 3 of the Prescription Ordinance, No. 22 of 1871, as amended, itself is not sufficient.

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[2] Pages 158-159 of the Brief.
[3] Pages 160, 165 of the Brief.
[4] Page 166 of the Brief.
[5] Last line at page 164 and first line at page 166.

In a co-owned property, every co-owner does not need to enjoy the property to have the co-ownership intact. The possession of one co-owner is in law the possession of other co-owners. Nothing short of ouster or something equivalent to ouster by an overt act as opposed to covert act is absolutely necessary to make possession adverse and end co-ownership.

As was held in *Pathmasiri v. Baby [2006] 1 Sri LR 35*:

> *Mere possession of a specified portion of co-owned property for convenience cannot constitute an adverse possession although he possessed the specified portion for more than 50 years.*

Justice G.P.S. de Silva (later Chief Justice) in *Wickremaratne v. Alpenis Perera [1986] 1 Sri LR 190 at 195* summarized the law in this respect as follows:

> *Ever since the decision of the Privy Council in Corea v. Iseris Appuhamy (1911) 15 NLR 65 it is settled law that-*
>
> *a) a co-owner's possession is in law the possession of other co-owners;*
> *b) that every co-owner is presumed to be possessing in his capacity as co-owner;*
> *c) that it is not possible for a co-owner to put an end to his possession as co-owner by a secret intention in his mind;*
> *d) that nothing short of ouster or something equivalent to ouster could bring about that result.*

It was also stressed in this case that "*possession of divided portions by different co-owners in no way inconsistent with common possession.*"

As held in *Sediris Appuhamy v. James Appuhamy (1958) 60 NLR 297 at 302-303:*

> *Every co-owner is in law entitled to his fractional share of everything in the co-owned property including the soil as well as the plantations, but in practice it is not possible for every co-owner to enjoy his fractional share of every particle of sand that constitutes the common property and every blade of grass and every fruit from the trees growing on the land without causing much inconvenience to himself as well as other co-owners. To avoid this, for the sake of convenience, co-owners possess different portions of the common land often out of proportion to their fractional shares merely because of improvements they have effected. That is what I understand convenience of possession to mean and possession of a specific portion of the common property for such a purpose would certainly result in material advantage referred to by the learned District Judge, In my opinion, the evidence in the case does not justify a presumption of ouster. No doubt possession of the separate lots A, B and C by Andiris and his heirs has been for a very long period but this alone is insufficient to establish title by prescription.*

In *Maria Fernando v. Anthony Fernando [1997] 2 Sri LR 356* it was held that:

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

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

I cited those authorities to say that even in cases where there was strong evidence of long possession with clear boundaries, the Courts have been loath to transform such possession to prescriptive possession when it is among the co-owners. But the facts are different in the instant case. The 3rd defendant in this case did not give evidence on prescription. He stressed only on the dismissal of the plaintiff's action in the previous case. However, it is interesting to note that the 3rd defendant who placed his complete confidence and reliance in the Judgment of the previous case No. 531/L, did not at least mark a copy of that Judgment in evidence!

The learned counsel for the 3rd defendant-appellant in his written submissions states that: "*the said case had been dismissed after considering the evidence of the parties on the ground that the plaintiff had not proved his title. The defendants prescriptive title had been admitted by the learned Trial Judge*." It is with regret I have to note that both those assertions are factually incorrect. A photocopy of the Judgment of the said case (which is not part of evidence) is found at pages 73-78 of the Appeal Brief. I cannot find a copy of the plaint in the previous case in the Brief. The said Judgment has been delivered on 15.10.1982. According to the said Judgment the present plaintiff has filed the above action against the 3rd defendant in the instant case seeking declaration of title to the same land which is the subject matter of this partition action. The learned District Judge has dismissed that action on the

basis that, the 3rd defendant, according to his pedigree, has undivided rights to the land, and therefore the plaintiff's action cannot be maintained.[6] In other words, the plaintiff's action has been dismissed as the plaintiff has failed to prove that he is the sole owner of the land. The prescriptive claim of the 3rd defendant to Lot 1 in Plan No. 709 has been left unanswered on the basis that answering that issue does not arise as the action of the plaintiff is dismissed.[7] No party has appealed against that Judgment. In my view, it is wrong to say that the plaintiff was the looser and the 3rd defendant of the present case was the winner in that case. In my view, both were losers, and the plaintiff, in consequence of that Judgment rightly filed this partition action. Even though the 3rd defendant was not made a party to this case by the plaintiff, the 3rd defendant was later added as a party and filed a statement of claim and actively participated in the trial.

There is no *res judicata* at all as the rights of the parties were not adjudicated in the earlier case. If I may repeat, what the learned District Judge stated in the Judgment of the other case was that both the plaintiff and the 3rd defendant have undivided rights to the land. But unfortunately, the 3rd defendant did not produce his Deeds and claim his undivided rights in the partition action. Instead, he sought dismissal of the partition action on the strength of the said Judgment, and also, in the alternative, claimed prescriptive rights to Lot 1 of the Preliminary Plan without leading any evidence on prescription. The Judgment of the said Land case was pronounced on

[6] Vide penultimate paragraph of page 62 of the Brief.
[7] Vide first paragraph of page 78 of the Brief.

15.10.1982 and the plaintiff filed this action on 18.06.1990-less than 8 years after the Judgment of that case.

The Judgment of the District Court is affirmed and the appeal is dismissed with costs.

Judge of the Court of Appeal