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

Rathnayake Mudiyanselage Muthu Banda (Deceased)

of Mottappuliya, Rambukkana.

PLAINTIFF-APPELLANT

C.A. Case No.1061/2000 (F)

D.C. Kegalle Case No.24023/P

1. Rathnayake Mudiyanselage Jayathilaka Bandara
2. Rathnayake Mudiyanselage Sunil Janaka Mangala Bandara
3. Rathnayake Mudiyanselage Susila Ramya Kumari

All of No.3/27, "Mangala",

Bodhiraja Mawatha, Mottappuliya,

Rambukkana.

Substituted PLAINTIFF-APPELLANTS

-Vs-

Rathnayake Mudiyanselage Jedius Singho

of Mottappuliya, Rambukkana.

DEFENDANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Mohan Walpita for Plaintiff-Appellants

Defendant-Respondent absent and unrepresented

Decided : 10.07.2019

A.H.M.D. Nawaz, J.

The Plaintiff-Appellant instituted this action in order to partition a land called "*Gal Kohuweambahahamulahena*" now known as "*Watta*" morefully described in the schedule to the plaint. The Plaintiff averred that the Plaintiff was entitled to 1/3rd of the land, whereas the Defendant owned 2/3rd of the corpus. In fact as the deed bearing No.3965 in favour of the Plaintiff indicates, he was given 1/3rd of a larger land which is in an extent of 12 *lahas*. The Plaintiff then contends that his extent should constitute 4 *lahas* but it has got reduced after the learned District Judge dismissed her plaint at the end of the trial.

There were two plans that figure in the case. In the 1st plan that was commissioned (marked as Y-p 157), the boundaries of the land sought to be partitioned and the boundaries shown in the plan did not tally at all.

In consequence, the Plaintiff commissioned a 2nd plan namely 1082A (which was marked as X) which was drawn by the same Commissioner after a second survey but this time around, this plan reflected the same boundaries as in the plaint. This plan was impeached by the Defendants as fraudulent and having been drawn with a view to bringing the boundaries in line with the boundaries shown in the plaint. It is curious that the surveyor who showed different boundaries in the 1st plan reflected in the 2nd plan identical boundaries to those found in the schedule to the plaint.

Since this discrepancy was seriously challenged as fraudulent, it was incumbent upon the Plaintiff to have summoned the surveyor to give evidence in order to clarify the discrepancy. In the absence of such evidence, one cannot place much reliance on the 2nd plan 1082A, even though the learned District Judge relies upon it to conclude that the identity of the corpus has not been fully established by the Plaintiff. Another important conclusion that the learned District Judge arrives at is that lots 1 and 2 in the 1st Plan bearing No.1082 have been dividedly possessed by the Defendant for more than 10 years and thus they should be excluded. This finding was not challenged at all by the learned Counsel for the Plaintiff-Appellant. In fact upon a perusal of the evidence led in the case,

it is quite clear that parties have not been in co-ownership of the corpus sought to be partitioned and it is for this reason that the learned District Judge takes the view that if lot 1 and 2 are excluded, then the remaining portion lot 3 in Plan 1082 belongs exclusively to the Plaintiff and there is no necessity for a partition in the case. This divided portion of lot 3 has been in the uninterrupted and undisputed possession of the Plaintiff for more than 10 years and lot 3 should thus belong to the Plaintiff. The tenor of the judgment of the learned District Judge is that the land comprising lots 1, 2 and 3 as depicted in the 1st plan 1082 had long ceased to be co-owned

In other words if lot 1 and 2 are excluded as prayed for by the Defendant, there remains lot 3 which is admittedly a land that reflects the property of the Plaintiff. All this shows that a co-owned property was not brought into the case for partition and Section 2 of the Partition Law No.21 of 1977 as amended mandates that it is a co-owned land that has to be brought into a partition suit and not when common ownership has long been terminated.

Even the Counsel for the Plaintiff-Appellant did not challenge this finding of the learned Counsel for the Plaintiff-Appellant before this Court and the dismissal of the Plaintiff is in my view substantially correct.

If one takes a commonsense view which accords with reality, one cannot complain about the decision of the District Judge because if the length of possession is such that the inference of ouster is possible, I do have to perforce agree with the learned District Judge and the famous passage on prescription among co-owners in ***Tillekeratne v. Bastian*** (1918) 21 N.L.R 12, Bertram C.J. supports this position.

> *"If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as memory reaches, that he and they have done nothing to recognize the claims of the other co-owners...."*

In the circumstances I proceed to affirm the judgment of the District Judge of *Kegalle* dated 10.11.2000 and dismiss the appeal.

JUDGE OF THE COURT OF APPEAL