

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

Karunawathie karunanayake,
Akarawita, Awissawella.

2nd Defendant/Appellant

C.A. Case No. 1049/2000 (F)

Avissawella D.C. Case No. 18848/P

V.

1. Dangampalage Pieris Dharmapala,
 2. Dangampalage Gnanarathne,
 3. Dangampalage Wijesena.
- All of Akarawita, Avissawella.

Plaintiffs/Respondents

AND

- 1a. Punyasena Gunaratne Jayathilake of 125,
Akarawita, Kosgama.
- 3a. Sarath Jayathilake of Salawa, Kosgama.
4. H.K. Nimalasena, Mahawatta,
Tittapattara.
- 5a. Katriarachchige Pinnawala Elamalawatta
6. Karunawathie Rupasinghe of Pinnawala,
waga.
7. Rajapaksa Pathirage Agnes of Akarawita,
Avissawella.
8. Rajapaksa Pathirage Somapala of
Thawalgoda, Kosgama.
9. Rajapaksa Pathirage Ranathunga.

10. Rajapaksa Pathirage Jayasinghe. Both of Thawalgoda, Kosgama.
11. Ulpagoda pathirage Peter singho of Akarawita, Avissawella.
12. Ulpagoda pathirage Peter singho.
13. Ulpagoda pathirage Wipulawathie both of Akarawita, Avissawella.
14. Liyanage Karunarathne.
15. Liyanage Ratnasena.
16. Liyanage Elisa Nona all of Pinnawala, Waga.
17. Tanippuli Arachchige Don Nimal Gunaratne Jayathilake of Akarawita, Avissawella.

1st and 3rd to 17th Defendants/
Respondents

BEFORE

: **JANAK DE SILVA, J**
K. PRIYANTHA FERNANDO, J

COUNSEL

: Sajeevi Siriwardhena for
the 2nd Defendant/Appellant.

Nirma Karunarathne for the 01st, 02nd and 3rd
Plaintiff/Respondents

ARGUED ON

: 02.04.2019

WRITTEN SUBMISSIONS

FILED ON

: 27.02.2019 by the 01st 2nd and
3rd Plaintiff/Respondents.

25.02.2019 by the 2nd Defendant/Appellant

JUDGMENT ON

: 23.07.2019

K. PRIYANTHA FERNANDO, J.

01. 01st, 02nd and 3rd Plaintiff Respondents (Plaintiffs) filed the above partition action in the District Court of Avissawella to partition the land called Hikhawatta alias Hiko-watta in extent of approximately 01 acre and 01 rood. Preliminary plan No.4286 was prepared by licensed surveyor Sena Iddamalgoda which was marked and produced as X at the trial. In the preliminary plan, the land was shown in 02 lots as lot 01 and 02.
02. The 2nd Defendant Appellant (Appellant) by her statement of claim, while disputing the Plaintiff's pedigree, claimed prescriptive title to lot No 02 in the preliminary plan. After trial, the learned District Judge in his judgment held that the 2nd Defendant Appellant failed to prove prescriptive title to lot No.02 and accepting the plaintiff's pedigree ordered that the shares to be divided according to the Plaintiff's pedigree.
03. Being aggrieved by the said judgment, Appellant preferred the instant appeal. The contention of the Appellant is that the learned District Judge erred when he decided that the Appellant failed to prove his prescriptive title to lot No. 02 of the preliminary plan X. It is submitted by the counsel for the Appellant that on the evidence placed before the District Court, Appellant has proved that the Appellant and her predecessors possessed lot No.02 exclusively against the other co-owners.

04. The contention of the Plaintiffs is that, as admitted by the Appellant in cross examination, that Corenelis had 5 children and not only Marthelis as alleged by the Appellant. Therefore, the alleged contention that Marthelis is the only heir of Corenelis is not tenable. It is further submitted, that the Appellant admitted that 1st Defendant possessed lot No. 01, and therefore, there was no agreement or an arrangement entered upon by the co-owners to divide the lots and possess the land separately.
05. Although, Plaintiffs now contend that Cornelis had 5 children including Marthelis, neither the Plaintiffs nor the Appellant and the other Respondents in the action in the District Court had taken steps to include them as parties to the action. Nor they have intervened as parties to the action.
06. When the parties are co-owners, mere possession for 10 years would not suffice to gain prescriptive title to a land co-owned. Every co-owner is presumed to be in possession in his capacity as a co-owner. In case of *Maria Fernando V. Anthony Fernando [1997] 2 Sri L.R. page 356* Court of Appeal 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 an ouster”

07. Therefore, it is incumbent upon the Court to see not only whether the 2nd Defendant possessed lot No.02 of the preliminary plan ‘X’ for more than 10

years, but also whether before commencing the period of 10 years of possession, there had been an overt act of ouster against the other co-owners.

08. According to the Surveyor Sena Iddamalgoda, and according to the report submitted on the preliminary plan, 1st and the 2nd Plaintiffs as well as 1st, 2nd and 4th respondents had been present when he went to survey the land. 4th Respondent had claimed for the 10-12-year-old 'Albesia' plantation that was in lot No.02. 2nd Defendant had said that she had been in possession of lot 02 for last 75 years. In evidence, 4th Defendant conceded that he planted 'Albesia' in lot No 02 with the permission of Appellant. He said that Sepala planted in the other portion and that the two lots were divided by a live fence. Appellant giving evidence said that her predecessor, and then she, was in possession over lot 02 against others rights.

09. 1st Plaintiff D. Pieris Dharmapala in his evidence in cross examination admitted that the 4th Defendant Nimalasena, (the 4th Respondent) planted 'Albisia' in the southern part of the land. In cross examination he further admitted that the Appellant and her predecessors had been in possession of lot 2 since year 1961. He further admitted that the Appellant and her predecessors possessed lot No.02 against the rights of others. As per his evidence in page 114 of the District Court record:

ප්‍ර: ඊට හේතුව 2 වන විත්තිකාරිය නඩුවට මැන ඇති අංක 02 දරන කොටස අවුරුදු ගණනාවක් තිස්සේ භුක්ති වින්ද නිසා?

උ: අපේ පියා මළාට පසු පටන් ගත්තා. 1930 ගණන් වල පටන් ගත්තා. ඊට පෙර අපේ ආතා සහ මාමලා භුක්ති වින්දා.

ප්‍ර: 1930 ගණන් වල මොකක්ද 2 වන විත්තිකාරිය පටන් ගත්තේ?

උ: බටහිර පැත්තට පැනලා රබර් වගා කළා.

ප්‍ර: කවුද පැත්තේ?

ප්‍ර: ඒ කාලේ ඒ අයගේ බාප්පලා.මහප්පලා.

උ: කවුද ඒ අය?

ප්‍ර: මර්තේලිස් සහ සයිමන්

උ: අංක 2 දරන කොටස මැනලා තිබුණා?

ප්‍ර: ඔව්.

10. Witness Singappuli Arachchilage Don David Jayathilake who testified on behalf of the Plaintiffs also admitted that the 2nd Defendant's predecessors possessed lot No.02 (Referred to as the land towards the south and west to the land possessed by Sepalis) against the rights of all others. As recorded in page 146 of the record he said:

ප්‍ර: මර්තේලිස් ඒක ගලවලා මොනවාද වගා කළේ?

උ: මොනවත් වගා කළේ නැහැ. ඇල්බිසියා හිටවන්න මර්තේලිස්ගේ දුව දන්නා, කරුණාවතීට.

ප්‍ර: ඇල්බිසියා වගාව සේපාලිස් භුක්ති වින්ද කැබැල්ල හැර මේ ඉඩමේ අනිත් සියලු කොටසේම විහිදිලා ගියා නේද?

උ: ඉතිරි හරියේ සියල්ලේම ඇල්බිසියා හිටෙව්වා.

ප්‍ර: 1950 ගණන් වල ඇල්බිසියා හිටෙව්වේ?

උ: ඒක මතක නැ.

ප්‍ර: රබර් ගැලෙව්වාම ඇල්බිසියා මුළු ඉඩමේම හිටෙව්වා?

උ: ඔව්

ප්‍ර: ඒ ඇල්බිසියා හිටෙව්වේ මර්තේලිස්ගේ දුවගේ ඉල්ලීම මත?

උ: ඔව්.

ප්‍ර: ඒක වගා කළේ කවුද?

උ: විමලසේන.

ප්‍ර: ඒ ඇල්බිසියා වගා කරනකොටත්, මර්තේලිස් රබර් වගාව භුක්ති විඳින කොටවත්, කිසිවෙක් මෙම රබර් වගාවට හෝ ඉඩමටත් ඇල්බිසියා වගාවටත් අයිතිවාසිකම් කිව්වේ නැහැ නේද?

උ: මේ ඉඩමට යන අයට යන්න දෙන්නේ නැහැ. පන්න ගන්නවා. මර්තේලිස්ගේ පැත්තේ අය. ඒ අය 5 දෙනෙක් ඉන්නවා. ගමේ බලපුලුවන්කාරයෝ.

ප්‍ර: ඒ නිසා ධර්මපාල මහතාට හෝ තමාට හෝ වෙන කිසිවෙකුට මේ රබර් වගා කර තිබෙන හරියට හෝ ඇල්බිසියා වගා කර තිබෙන හරියට යන්න දෙන්නේ නැතිව පන්න ගන්නවා?

උ: මට අයිතිවාසිකමක් නැහැ.

ප්‍ර: වෙන කාටවත් එන්න දෙන්නේ නැතිව භුක්ති විඳිනවා නේද?

උ: ජේම්ස් හැර වෙන කාටවත් යන්න දුන්නේ නැහැ.

11. Therefore, as admitted by the Plaintiffs it is clear that the Appellant had gained prescriptive title by possessing lot No.02 for a period more than 10 years ousting all other co-owners. Hence the learned District Judge has erred when he found that the Appellant had not proved prescriptive title to lot No.02. Therefore, we make order that lot No. 02 of the preliminary plan No. 4286 of Surveyor Sena Iddamalgoda should be excluded from the land to be partitioned.

Appeal allowed with costs.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL