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

Horanage Premaseeli Fernando
No.34/12, Dagasaw Lane,
Molpe, Moratuwa.
PLAINTIFF

C.A. Case No.799/2000 (F)
D.C. Moratuwa Case No.05/P

-Vs-

1. Bentotage Dharmawathie
2. Warnapurage Jeewarni Fernando
Both of No.30/04, Dagasaw Lane,
Molpe, Moratuwa.
DEFENDANTS

AND

Horanage Premaseeli Fernando
No.34/12, Dagasaw Lane,
Molpe, Moratuwa.
PLAINTIFF-APPELLANT

-Vs-

1. Bentotage Dharmawathie
2. Warnapurage Jeewarni Fernando
Both of No.30/04, Dagasaw Lane,
Molpe, Moratuwa.

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

Horanage Premaseeli Fernando
No.34/12, Dagasaw Lane,
Molpe, Moratuwa.
PLAINTIFF-APPELLANT

-Vs-

1. **Bentotage Dharmawathie** (Deceased)

1A. **Warnapurage Nihal Fernando**
No.30/04, Dagasaw Lane,
Molpe, Moratuwa.
1A substituted DEFENDANT-RESPONDENT

2. **Warnapurage Jeewarni Fernando**
No.30/04, Dagasaw Lane,
Molpe, Moratuwa.
2nd DEFENDANT-RESPONDENT-

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Lasith Chaminda with Mihiri Abeyratne for the Plaintiff-Appellant Rohana Jayawardena for the 1(A) and 2nd Defendant-Respondents
Decided on	:	01.08.2019

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

The Plaintiff-Appellant who had purchased the 241/420th share of the subject-matter in the action instituted this partition action against the 1st Defendant-Respondent and in the plaint dated 04.09.1992, the Plaintiff-Appellant acknowledged the 1st Defendant-Respondent as a co-owner and allotted 99/420 share in the corpus. Both the Plaintiff and 1st Defendant admit that one Janish Fernando was the original owner who had seven children. Both the Plaintiff-Appellant and 1st Defendant-Respondent trace their title to their shares in the land, through the chain of title that had devolved on the seven children of the original owner-Janish Fernando.

It has to be noted that the Plaintiff-Appellant-Premaseeli purchased her interest in the land by a Deed bearing No.157 of 12.05.1992 **(P1)**, whilst the 1st Defendant-Respondent had long been there on the land subsequent to her purchase of her share in the land by a Deed bearing No.5591 of 18.05.1964 **(P2)**. If one looks at the chronology of events in the case, the 1st Defendant-Respondent had entered the land as a co-owner on 18.05.1964, which is referable to a lawful title acquired on 18.05.1964 by **P2**.

It is in evidence that though the 1st Defendant-Respondent became only a co-owner of the land in question on 18.05.1964, she had been in exclusive possession of the entire land and in fact the 1st Defendant-Respondent had allowed the Plaintiff's husband to occupy one of the houses on the land namely the house bearing No.12/34 which belonged to the 1st Defendant. In other words, the Plaintiff-Appellant had entered the house 12/34 with the leave and license of the 1st Defendant as an occupier under the leave and licence given to her husband by the 1st Defendant. This testimony of the 1st Defendant was not contradicted at all.

In any event, the Plaintiff-Appellant acquired title to her share of the land on 12.05.1992 by purchasing a right in the land by Deed No.157 and filed this partition action four months later on 04.09.1992. Her predecessors in title, all being the heirs of the original owner, had never been in possession of the portion of the land that passed to the Plaintiff-Premaseeli and though the Plaintiff alleged that she became a co-owner of the subject-matter of

partition action on 12.05.1992, the basis on which the 1st Defendant filed her joint answer is that she had long prescribed to the land in question since 1964.

In other words, by the time the Plaintiff acquired her title to her share in the land, the contention of the 1st Defendant is that she had prescribed to the land since 1964 to the exclusion of all the other owners inclusive of the predecessors in title of the Plaintiff-Respondent.

It falls to be determined whether the possession of the 1st Defendant became adverse to the interests of all the co-owners inclusive of the predecessors in title of the Plaintiff-Respondent. The argument of the 1st Defendant is that long before the Plaintiff-Appellant acquired ownership in land on 12.05.1992, she had became the owner of the entire land by prescription and if that argument were to prevail against the acquisition of paper title by the Plaintiff, the law relating to prescription among co-owners has to be examined.

The original owner admittedly had seven children and it is from some of them that the 1st Defendant had derived her title in 1964. None of the seven children of the original owner or their issues had been in possession of the land and no one from among them came forward to give evidence. There is evidence that since 1964 the 1st Defendant had been in possession of the land.

The law on prescription among co-owners operates on the basis of ouster (*Corea v. Iseris Appuhamy* 15 N.L.R 65) or presumption of ouster (*Tillekeratne v. Bastian* 21 N.L.R 12) Since the 1st Defendant entered the land, though it was after he had bought a fractional share in the land, he had been in possession of the entirety of the land.

Evidence has been led that the 1st Defendant built houses all over the land and let one of them to the husband of the Plaintiff as a licensee. None of the co-owners had objected to the construction of these houses and there has been total abandonment of the land on their part until some of the grandchildren of the original owner sold a fractional share to the Plaintiff who was the wife of the licensee of the 1st Defendant, in 1972. Between 1964 and 1972, 28 years had lapsed and it was long before 1972, the houses had built by the 1st Defendant.

The 1st Defendant collected the rents from the husband of the Plaintiff and he also filed action to eject the husband. There was no evidence given by the vendors to warrant and defend the title of the Plaintiff. It was just four months after the purchase in 1972 that the Plaintiff filed this partition action. The assertion of the 1st Defendant that he had adversely possessed this land for 28 years has not been rebutted and his acts have not been challenged at any stage by any co-owners.

In fact, I recognize the fact that when a person buys a fractional share in a co-owned land he is deemed to continue in that capacity but his possession may become adverse to the others when some act of ouster or some definite facts from which one could infer a change in the character of the Defendant's intention with regard to the holding of the land are established.

It will be sufficient for this purpose to adopt the definition given in Smith's Leading Cases that "adverse possession" is "possession held in a character incompatible with the claimant's title"-see Bertram C. J. in *Tillekeratane vs. Bastian* (*supra*).

As regards long possession of the property by one co-owner uninterrupted by other co-owners, Bertram C.J. gives an example as follows: "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 reasonable memory reaches; that he and they have done nothing to recognize the claims of the other co-owners; that he and they have taken the whole produce of the property for themselves; and that these co-owners have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession. Where it is found that, presumptions of law lead to such an artificial result, it will generally be found that the law itself provides a remedy for such a situation by means of counter-presumptions. If such a thing were not possible, law would in many cases become out of harmony with justice and good sense".

De Sampayo J. puts the matter thus:- "While a co-owner may, without any interference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owners the aspect of things will not be the same in the case where valuable minerals are taken a long series of years without any division in kind or money".

The Courts have recognized other circumstances from which a presumption of ouster may be drawn but that has never been done where the only circumstance consists of long continued possession where the other co-owners are also in possession of other allotments of the same land.

The position is different where one co-owner is in possession of the entire common land and does not account for or share with his other co-owners the income derived therefrom. For instance, in *Subramaniam vs. Sivarajah* 46 N.L.R 540 the Court presumed an ouster from the fact that one co-owner was in possession of the entire land and took the profits exclusively and continuously for a period of over 60 years without accounting to the other co-owners who lived in close proximity under circumstances which indicated a denial of a right in any other co-owners to take or receive them.

So when the 1st Defendant seeks to establish a prescriptive title against another by reason of his long–continued exclusive possession, it depends on the circumstances of each case whether it is reasonable to presume an ouster from such exclusive possession.

I find in this case that until some of the grandchildren of the original owner who had themselves no possession in the land sold a fractional share to the Plaintiff in 1992, the 1st Defendant had encountered no opposition on the land and it is arguable that the Plaintiff may have bought this property from people who had long lost title to their fractional shares by virtue of prescriptive title that the 1st Defendant had already acquired to the land.

In *Abdul Majeed vs. Ummu Zaneera* 61 N.L.R 361 K.D. de Silva J held:

"In considering whether or not a presumption of ouster should be drawn by reason of long-continued possession alone, of the property owned in common, it is relevant to consider the following, among other matters:-

(a) The income derived from the property,

(b) The value of the property,

(c) The relationship of the co-owners and where they reside in relation to the situation of the property,

(d) Documents executed on the basis of exclusive ownership".

H.N.G. Fernando J. in this case states: "Firstly, section 3 (of the Prescription Ordinance) imposes two requirements: "undisturbed and uninterrupted possession" and "possession by a title adverse and independent "; secondly, the question whether 'the second of these requirements is satisfied does not arise unless the first of them has been proved. It is clear from the judgment of the Privy Council in Corea's case (*supra*) that a co-owner in possession can satisfy the second requirement in two different modes:-

(a) by providing that his entry was not by virtue of his title as a co-owner, but rather of some other claim of title; in fact Their Lordships, in Corea's case, rejected the finding of the Supreme Court that the possessor had entered as sole heir of the former owner;

(b) by proving that, although his entry was by virtue of his lawful title as a co-owner nevertheless he had put an end to his possession in that capacity by ouster or something equivalent to ouster, and that therefore and thereafter his possession had been by an adverse or independent title".

From the evidence led in this case I take the view that sufficient evidence has been led by the 1st Defendant to establish that she had prescribed to the entirety of the land and no doubt the *ratio decidendi* of ***Corea vs. Appuhamy*** (*supra*) is that a person *entering as a co-owner* into possession of the common property cannot, by merely forming a secret intention which has

not been communicated to his other co-owners either by express declarations or by overt action, alter the character of his possession and thereby acquire title to their shares by prescription. This principle is, of course, subject to the rule of common sense that, in appropriate cases, an ouster may be presumed to have taken place at some point of time after the date of entry which was not originally adverse. *Tillekeratne vs. Bastian* (*supra*).

Upon a perusal of the totality of evidence led in the case, I take the view that possession of the 1st Defendant has gone beyond mere possession in the case and I see no reason to disturb the decision of the learned Judge of *Moratuwa* dated 18.10.2000.

Thus I affirm the judgment and dismiss the appeal.

JUDGE OF THE COURT OF APPEAL