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

8. Kankathanthri Edmand Peter Weeraratne (deceased),
Thelwatta,
Matiwala.

8(a) Kankathanthri Athula Kumaradasa Weeraratne,
Thelwatta,
Matiwala.

9. Kankathanthri Athula Kumaradasa Weeraratne,
Thelwatta,
Matiwala.

8th and 9th Defendant-Appellants

CASE NO: CA/1097/2000/F
DC BALAPITIYA CASE NO: 1335/P

Vs.

Korale Kankanamage Leelawathi,
Matiwela,
Thelwatte.
And 6 Others
Substituted 1(a)-(g) Plaintiff-Respondents
And 25 Defendant-Respondents

Respondents

Before: Mahinda Samayawardhena, J.

Counsel: S.A.D.S Suraweera for the 9th Defendant-Appellant.

P.P. Gunasena for the Plaintiff-Respondents.

Decided on: 07.08.2019

Mahinda Samayawardhena, J.

This is an appeal filed by the 8th and 9th defendants (appellants) against the Judgment of the learned District Judge of Balapitiya dated 12.09.2000. 19 years have passed since the filing of the appeal. When this appeal came up for argument the first time before me on 04.07.2018, as the learned counsel for the appellant was held up in another Division of this Court, argument was re-fixed for 05.07.2018. On 05.07.2018 also argument was postponed for 03.08.2018 as the learned counsel for the appellants was unavailable. On 03.08.2018, brief oral submissions were made by learned counsel for the appellants and the plaintiff (respondent). As the written submissions of both parties had not been filed by then, I directed both parties to file written submissions on or before 25.09.2018 with a copy to the Attorney-at-Law of the opposite party. Case was to be mentioned on 26.10.2018 to file reply submissions, if any. Learned counsel for the respondent has filed 1 ½ pages of brief written submissions on 15.10.2018. Case was called on 26.10.2018, 27.11.2018, 05.02.2018 and 27.02.2019 for the written submissions of the appellants to be filed, but no written submissions were filed. On 27.02.2019, I directed the written

submissions of the appellants to be tendered on or before 20.06.2019 and fixed the matter for Judgment for today. Up to now, no written submissions have been filed on behalf of the appellants.

I read the entire original case record of the District Court including the petition of appeal, amended plaint, amended statement of claim of the appellants, admissions and issues, evidence led at the trial with marked documents and the Judgment of the District Court to understand the grievance of the appellants.

There is no corpus dispute. Corpus is admitted. Original owners are admitted. They are Seeman, Johanis, James Sinno, Babanis and Siyohamy. There is a limited pedigree dispute raised by the appellants. That is (a) Kirihamy is not a child of Seeman and (b) Siyohamy had only one child, namely, Hinniappuhamy, and did not have three children. The other point the appellants raised was that they have prescribed to the land.

The learned District Judge in his Judgment has given very convincing reasons why he cannot accept those positions taken up by the appellants. It is a very well-written Judgment. Reasons given for his conclusions are lucid and coherent. There is hardly anything which I can add other than repeating the same reasons in English language.

The evidence of the all the witnesses at the trial has been led before the District Judge who delivered the Judgment. In a partition case where pedigree is unfolded by the witnesses

memory, this is very important. The plaintiff's evidence is convincing. He has given evidence with confidence.

If I may say very briefly, even though Kirihamy's birth certificate had not been produced, the fact that Kirihamy was a daughter of Seeman has been proved by other evidence. For instance, in Deed marked P3 (at page 341 of the brief), in the legend, it has been stated that Kirihamy is a daughter of Seeman.

The sole reason why the appellants are not agreeable to accept that Kirihamy was a child of Seeman is that, in the earlier partition case No. 10011, Kirihamy, who was the 38th defendant, was allotted Lot 16, whereas Seeman and his children, who were 32nd-36th defendants, were allotted Lot 20. Vide Final Decree of that case marked P1 at page 330-333 of the brief. It is the contention of the appellants that if Kirihamy was a child of Seeman, there was no reason to allot a different Lot and her share also could have been included in Lot 20. As the learned District Judge has explained in the Judgment, Lot 16 has not been allotted only to Kirihamy but both to Kirihamy and her husband, Haramanis, who were 38th and 39th defendants in that case. As Kirihamy was married and separated, they would have preferred to have a separate Lot, which is not unusual. The learned District Judge has also referred to the Interlocutory Decree of that case marked P2 (at pages 334-339 of the brief) to point out that the shares given to all the children of Seeman (34th-36th defendants and 38th defendant) are the same, that is each 1/840 share. This reasoning is acceptable.

Siyohamy's grandson-the 10th defendant has given evidence to say that Siyohamy had three children as opposed to the appellants' position that Siyohamy had only one son, who is Hinniappuhamy. Deeds marked P7 and P8 (at pages 356, 360 of the brief) *inter alia* go to show that Siyohamy had two other children, namely, Parlis Appu and Ratu Hamina.

The learned District Judge cannot be found fault with for accepting the version of the plaintiff on that limited pedigree dispute than that of the 9th defendant appellant, who, at the time of giving evidence was only 45 years of old. The 8th defendant-appellant never gave evidence.

The appellants' prescriptive claim to the entire land is not worth investigating. They were not serious on that claim. Notwithstanding they raised an issue on prescription, as I have already stated, at least the 8th defendant-appellant did not give evidence. According to the Preliminary Plan marked X, nobody is living on the land. The 8th defendant has marked some old electoral registers to say that he and his predecessors lived on the land long time ago. The land to be partitioned is one Lot, to be exact Lot 20, of a larger land, which is less than 10 perches in extent. The adjoining Lot is Lot 19. It is not clear where the 8th defendant-appellant and his predecessors lived sometime ago. In any event, they have not continued with possession.

Even though the 8th defendant did not give evidence he called his elder brother, Peter Weeraratne, who was at that time 83 years of old to give evidence on possession. His evidence (at pages 229-230 of the brief) was that appellants and their

predecessors were in possession not in Lot 20, which is the Lot to be partitioned, but on the adjoining Lot, which is Lot 19.

It is hackneyed that proof of prescription against a real owner is difficult, and proof of prescription against other co-owners is extremely 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 itself is not sufficient.

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 a covert act is absolutely necessary to make possession adverse and end co-ownership.

There is absolutely no such evidence in this case.

I unreservedly affirm the Judgment of the learned District Judge and dismiss the appeal of the appellants. However, I make no order as to costs.

Judge of the Court of Appeal