

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

CASE NO: CA/1244-1245/2000/F

DC PANADURA CASE NO: 17458/P

Kuruppu Arachchige Dona
Premalatha Piyaseeli (Deceased),
No. 299,
Alubomulla.

6th Defendant-Appellant

Kirillapanage Dona Yamuna
Pushparani,
No. 299,
Alubomulla.

6(a) Defendant-Appellant

Gamage Karunawathie Piyaseeli
Wijewardena (Deceased),
No. 39,
Kuruppumulla Road,
Panadura.

7th Defendant-Appellant

Sunil Ananda Wijewardena,
No. 39,
Kuruppumulla Road,
Panadura.

7(a) Defendant-Appellant

Vs.

Uswatta Liyanage Leelawathie
Perera,
Annasikotuwa,
Alubomulla
Plaintiff-Respondent
And 1st-5th Defendant-
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Vidura Gunaratne for the 6th Defendant-
Appellant.
Chatura Weththasinghe for the 7th Defendant-
Respondent.
B. Gamage for the Plaintiff-Respondent.
Jagath Wickramanayake, P.C., with M. Doss
for the 3rd Defendant-Respondent.

Decided on: 03.09.2019

Mahinda Samayawardhena, J.

The Plaintiff instituted this action in the District Court of Panadura seeking to partition Lot 3 of Delgahawatta in extent about 2 Roods among the Plaintiff and the 1st-4th Defendants. The 5th-7th Defendants later intervened in the case.

At the trial, Plan No. 242 was considered as the Preliminary Plan.¹ It consists of 4 Lots—A to D. Lot D, which is a road, and

¹ Page 214 of the Brief.

Lot A, claimed by the 5th Defendant as a part of Lot 2 of Delgahawatta², were excluded from the land to be partitioned.

There is no dispute that Lot B in Plan No. 242 is Lot 3 of Delgahawatta, the land to be partitioned. The dispute relates to Lot C in Plan No. 242, i.e. whether it forms part of Lot 3 of Delgahawatta. The position of the Plaintiff and the 1st-4th Defendants is that the said Lot C is part of Lot 3 of Delgahawatta whereas the contesting 6th and 7th Defendants take a different position.

At this juncture it is apt to state that the 7th Defendant at the end of the trial withdrew his issues as her dispute has amicably settled with the 6th Defendant wherein the 6th Defendant has agreed to give 10 perches to the 7th Defendant out of what she would get from the corpus. The case of the 7th Defendant rests on the success of the 6th Defendant's case. In short, if the 6th Defendant fails, the 7th Defendant shall also necessarily fail.³

I shall now advert to the issues raised by the 6th Defendant at the trial. They are issue Nos. 15-19.⁴ By those issues the 6th Defendant has taken up three positions.

- a) The Plaintiff's action shall fail as the Plaintiff has filed this action to partition a portion of a larger land known as Delgahwatta.
- b) The 6th Defendant is entitled to Lot C of Plan No. 242 by Deeds.

² Vide Plan No. 1064 at page 218 of the Brief and the Statement of Claim of the 5th Defendant at pages 165-170 of the Brief.

³ Vide the District Court written submission of the 7th Defendant at pages 269-275 of the Brief.

⁴ Pages 484-485 of the Brief.

- c) The 6th Defendant has acquired the said Lot C by prescriptive possession.
- d) The 6th Defendant is entitled to all the improvements and plantation in Lot C.

The learned District Judge has answered these issues against the 6th Defendant and entered Judgment as prayed for by the Plaintiff partitioning the Lots B and C of Plan No. 242 among the Plaintiff and the 1st-4th Defendants.

Being dissatisfied with the said Judgment of the District Court dated 11.09.2000, the 6th Defendant and the 7th Defendant have preferred two separate appeals.

When these two appeals came up for the first time before me, learned counsel for all the parties agreed to decide the two appeals by way of written submissions and abide by a single Judgment.

Both the 6th Defendant and the 7th Defendant, and also the Plaintiff and the 3rd Defendant, have filed written submissions.

I doubt whether the 7th Defendant can file a separate appeal against the Judgment in the circumstances of this case. Assuming she has, the only position taken up by the learned counsel for the 7th Defendant in his written submissions is that the Plaintiff cannot maintain this action to partition a portion of the larger land known as Delgahawatta. Admittedly the Plaintiff has filed this action to partition only Lot 3 of Delgahawatta.

This has been put in issue at the trial⁵ and the learned District Judge has rightly answered that issue in the negative relying *inter alia* on the 6th Defendant's own Deeds. The Deed marked 6D1, executed in 1914, relates to Lot 2 of Delgahawatta. According to the schedule of that Deed, the eastern boundary of Lot 2 is Lot 1 of Delgahawatta and the western boundary of Lot 2 is Lot 3 of Delgahawatta, which is the land to be partitioned in this case. That means, since at least 1914, Delgahawatta has been divided into separate Lots and possessed separately. Hence the finding of the learned District Judge on that issue is flawless. The only argument of the 7th Defendant before this Court therefore fails.

The learned District Judge has correctly held that the Deeds produced by the 6th Defendant at the trial are not relevant to the land to be partitioned, namely, Lot 3 of Delgahawatta.

This will take me to consider the appeal of the 6th Defendant. In the written submissions filed on behalf of the 6th Defendant instead of oral submissions, the only argument presented by the learned counsel for the 6th Defendant is that the 6th Defendant has prescribed to Lot C of Plan No. 242. The learned counsel has not claimed any undivided rights on the Deeds.

The 6th Defendant or her successor the 6(a) Defendant (who is the daughter of the 6th Defendant) was not living on that Lot. They are living on the land above the northern boundary of the land to be partitioned, which is Delgahawatta Kattiya.⁶ There is no documentary evidence except the four Deeds (which are not

⁵ Vide issue Nos. 15 and 16 at page 484 of the Brief.

⁶ Vide evidence of 6(a) Defendant at page 588 of the Brief. Vide also Deeds marked 6D2-6D4 executed in respect of the land Delgahawatte Kattiya.

relevant to the Lot in question) marked at the trial to establish uninterrupted and adverse possession over ten years.

A person who claims prescriptive title against the rightful owners who have paper title has a very heavy burden to prove all the requirements prescribed in section 3 of the Prescription Ordinance. The Plaintiff's Deeds relate to Lot 3 of Delgahawatta.

Mere possession over ten years is not prescriptive possession. The possession shall be by title adverse to or independent of that of the rightful owner. One cannot establish prescriptive title in the air. *"A facile story of walking into abandoned premises after the Japanese air raid constitutes material far too slender to found a claim based on prescriptive title."*⁷

There is another important point to be stressed. *"Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights."*⁸ *"He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster."*⁹

The parties to the case are close relations. The 6th Defendant Baby Nona is the younger sister of the Plaintiff.¹⁰ When the relationship between the parties is so close such as in the instant action, the proof of the overt act manifesting the

⁷ Sirajudeen v. Abbas [1994] 2 Sri LR 365 per G.P.S. de Silva C.J.

⁸ Sirajudeen v. Abbas [1994] 2 Sri LR 365 per G.P.S. de Silva C.J. Vide also Reginald Fernando v. Pabilinahamy [2005] 1 Sri LR 31 at 37 per Bandaranayake J. (later CJ), Chelliah v. Wijenathan (1951) 54 NLR 337 at 342 per Gratiaen J., Mitrapala v. Tikonis Singho [2005] 1 Sri LR 206 at 211-212 per Dissanayake J.

⁹ Seeman v. David [2000] 3 Sri LR 23 at 26 per Weerasuriya J.

¹⁰ Page 589 of the Brief.

commencement of adverse possession and leading strong affirmative evidence to show continuation of such adverse possession become extremely necessary.¹¹

The 6th Defendant in this case has failed to prove any of these things to successfully claim prescriptive possession to Lot C of Plan No. 242 against the real co-owners of that Lot.

The claim of prescription of the 6th Defendant to Lot C of Plan No. 242 is not entitled to succeed.

For the aforesaid reasons, I affirm the Judgment of the District Court and dismiss the appeals of the 6th and the 7th Defendants, but without costs.

Judge of the Court of Appeal

¹¹ De Silva v. Commissioner of Inland Revenue (1978) 80 NLR 292 per Sharvananda J. (later C.J.), Podihamy v. Elaris [1988] 2 Sri LR 129 per Goonewardena J.