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

In the matter of an appeal from the final judgment in the District Court of Kalutara in Case No. 6197/P.

CASE NO: CA/DCF/1132/99
D.C. Kalutara, Case No. 6197/P.

Anthonidura Bastian Silva,
Asrilananda Road,
Aluthagamwela,
Kaluwamodara, Aluthgama.

Plaintiff

Vs.

1. Wedikkara Chithra Kanthi De Silva

2. Wedikkara Mala Kanthi De Silva

3. Wedikkara Tiyara Kanthi De Silva

All of Srilananda Road,
Aluthgamwela,
Kaluwamodara, Aluthagama.

4. Dewapura Alice Nona
Pushpawasa, Kudumagal Kanda,
Maggona.

5. Wedikkara Tiara Kanthi De Silva,
Srilananda Road,
Aluthgamwela.
Kaluwamodera,
Aluthgama,

Defendants

AND NOW

1. Anthonidura Hemawathie (dead)

1a. Wedikkara Chithra Kanthi De Silva

2. Wedikkara Chithra De Silva

3a. Wedikkara Chithara Kanthi De Silva

5. Wedikkara Tiyara Kanthi De Silva

All of Srilananda Road,
Aluthgamwela,
Kaluwamodara, Aluthgama.

Defendant-Appellants

Vs.

Anthodura Bastian Silva,
Srilananda Road,
Aluthgamwela,
Kaluwamodara, Aluthgama.

Anthonidura Kulawathie Silva

Anthonidura Jayawathie Silva

Both of Srilananda Road,
Aluthgamwela,
Kaluwamdora, Aluthgama.

Substituted Plaintiff-Respondents

4. Dewapurage Alis Nona
   Pushpawasa, Kudamagal Kanda,
   Maggona.

4th Defendant-Respondent

Before: **M. T. MOHAMMED LAFFAR, J. &**
K. K. A. V. SWARNADHIPATHI, J.

Counsel**:** Rohan Sahabandu, PC with Chathurika Elvitigala, instructed by Hasitha Amarasinghe for the 1st, 2nd, 3a and 5th Defendant-Appellants.

Sanjeewa Dasanayake with Nilum Devapura, instructed by Dhammila Jiminige for the Plaintiff Respondent.

Written Submissions on: 10.05.2021 (by the Plaintiff-Respondent).

Argued on: 02.03.2021

Decided on: 05.10.2021.

MOHAMMED LAFFAR, J.

This is an appeal preferred by the 1st, 2nd, 3rd, and 5th Defendant-Appellants (hereinafter referred to as the respective "Appellants") from the judgment of the learned District Judge of Kalutara dated 06.10.1999.

The facts, briefly, in this case are as follows. The Plaintiff-Respondent (hereinafter referred to as the "Respondent") instituted action in the District Court of Kalutara in case No. 6197/P, seeking to partition the land more fully described in the schedule to the plaint amongst the co-owners as set out in paragraph 09 of the plaint. The Appellants, having filed their statements of objection moved for a dismissal of the action on the footing that they have obtained prescriptive title to the land sought to be partitioned. After trial, the learned District Judge of Kalutara, declined to accept the contention of the Appellants and pronounced the impugned judgment to partition the subject matter as prayed for in the plaint.

Being aggrieved by the judgment, the instant appeal has been preferred by the appellants.

The Corpus:

Admittedly, the lot 9 in the final partition plan bearing No. 344 in case No. 5666/P in the District Court of Kalutara marked 1V10 is the corpus sought to be partitioned in this case. The subject matter is properly depicted as lot No. 9 in the preliminary plan bearing No. 294 dated 13.09.1993 made by K.D.L. Wijeynayake, Licensed Surveyor marked X. The report of the commissioner is produced as X1. It is pertinent to be noted that, having superimposed the title plan 1V10 on the preliminary plan X, the commissioner has given his opinion under section 18 (1) (a) (iii) of the Partition Law, No. 21 of 1977 (as amended), stating the land depicted in plan X is the corpus described in the schedule to the plaint. It is pertinent to be noted that there is no dispute as to the identification of the subject matter.

Pedigree:

By virtue of the final decree in case No. 5666/P marked P1, the corpus in this case was allotted to Anthonidura Gunehamy and Peththandy Ordiris Silva (3/5), and Anthonidurai Helenis (2/5). On the demise of the aforesaid Anthonidura Gunehamy and Peththandy Ordiris Silva, those rights devolved on their children, namely Wimalawathi and Mithraratne. The said Wimalawathi and Mithraratne by deed No. 14004 dated 04.10.1960 marked P6/1V9, conveyed their rights to Wedikkara Dayawansa Silva and upon his demise those rights devolved on his heirs, namely the surviving spouse Hemawathi (3/10) who is the 1st Appellant in this case and children, the 2nd Appellant Chithra (3/20) and 3rd Appellant Mala Kaanthi (3/20).

The aforesaid Anthonidura Helenis conveyed his undivided 2/5 shares to Anthonidura Jemis Silva by deed bearing No. 05 dated 10.05.1933 marked P2, who transferred the same to Ruby Mendis

Abeysekera by deed No. 26812 dated 22.01.1938 marked P3, who conveyed those rights to Charlis Silva by deed No. 32265 dated 04.07.1944 marked P4. The said Charlis Silva by deed bearing No. 246 dated 28.02.1964 marked P5 transferred his rights to the respondent in this case, namely Anthonidurain Bastian Silva (2/5). Accordingly, the learned trial Judge has allotted shares to the co-owners as follows:

The Respondent : 8/20

The 1st Appellant : 6/20

The 2nd Appellant : 3/20

The 3rd Appellant : 3/20

It is to be noted that there is no dispute as to the pedigree set out in the impugned judgment. It appears to this Court that the learned trial Judge has rightly examined the title of each, and every co-owner as spelt out in section 25 of the Partition Law.

Dispute:

Having framed the points of contest No. 4 to 8, the Appellants took up the position that the plaint is liable to be dismissed on the footing that they have obtained prescriptive title to the subject matter. The finding of the learned trial Judge was that the Appellants failed to establish the purported claim of prescriptive title to the corpus.

Thus, the question for determination in this appeal is whether the learned trial Judge erred in law and facts in deciding that the Appellants failed to establish the claim of prescriptive title to the land sought to be partition.

Law related to the dispute:

Undisputedly, the 1st, 2nd and 3rd Appellants are co-owners of the subject matter. Generally, one co-owner is in possession of common

land on behalf of other co-owners. If a co-owner claims prescriptive title against other co-owners, it is necessary to prove "ouster" in addition to the requirements set out in section 3 of the Prescription Ordinance, No. 22 of 1871 (as amended).

In ***Corea v. Appuhamy*** *[1911] 15 NLR 65*, it was held that,

> *"A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result".*

In the case of ***Wickramaratne and Another v. Alpenis Perera*** *[1986] 1 Sri LR 190*, the Court of Appeal observed that,

> *"In a partition action, for a lot of land claimed by the plaintiff to be a divided portion of a larger land, he must adduce proof that the co-owner who originated the division and such co-owner's successors had prescribed to that divided portion by adverse possession for at least ten years from the date of ouster or something equivalent to ouster. Where such co-owner had himself executed deeds for undivided shares of the larger land after the year of the alleged dividing off it will militate against the plea of prescription. Possession of divided portions by different co-owners is in no way inconsistent with common possession.*
>
> *A co-owner's possession is in law the possession of the co-owners. Every co-owner is presumed to be in possession in his capacity as co-owner. A co-owner cannot put an end to his possession as co-owner by a secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."*

In ***Thilakaratne v. Bastian*** *[1918] 21 NLR 12*, the full bench of the Supreme Court considered the meaning of "adverse possession" in an exhaustive manner, which reads thus:

> "*Possession by one co-owner is presumed as the possession on behalf of all of the co-owners. For one co-owner to acquire prescriptive title against the other co-owners, he shall prove ten years exclusive possession after changing the nature of the possession to one of adverse to the title of others.*"

In the case of ***Maria Fernando and Another v. Anthony Fernando*** *[1997] 2 Sri LR 356 (CA)*, Wigneswaran J clearly and briefly simplified the requirements to acquire prescriptive title among co-owners as follows:

> *"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 ouster."*

In ***Maria Perera v. Albert Perera*** *[1983] 2 Sri LR 399 (CA),* B.E. De Silva J and G.P.S. De Silva J (as he then was), observed that,

> *"An amicable partition can be a starting point of prescription even though no deed of partition or cross deeds or other documents have been executed. But inclusive possession by a co-owner for a period of 10 years alone cannot give rise to prescriptive title. There must be the further important element of all change of circumstances from which an inference could reasonably be drawn that such possession is averse to and independent of "all other co-owners. There must be proof of circumstances from which a reasonable inference could be drawn that such possession had become adverse at some date*

ten years before action was brought. Mere exclusive possession for 20 years (by taking the natural produce of the land) on a plan not signed by any of the co-owners to whom the plaintiff claimed lots were allotted cannot constitute proof of ouster. The possession of a co-owner would not become averse to the rights of the other co-owners until there is an act of ouster or something equivalent to ouster".

K.D. De Silva J and H.N.G. Fernando J (Basnayake CJ dissenting), in the case of ***Abdul Majeed v. Ummu Zaneera*** *[1959] 61 NLR 361*, decided that,

> *"Proof that one of the co-heirs let out the premises and appropriated to himself the entire rent (which was not much) for thirty-seven years was insufficient, by itself, to bring the case within section 3 of the Prescription Ordinance."*

In ***Chelliah v. Wijenathan*** *[1951] 54 NLR 337 at 342*, Gratien J stated that,

> "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."

In the light of the above legal literature, it is abundantly clear that a considerable prudence is always necessary to recognize prescriptive title as undoubtedly it deprives the ownership of the party having paper title. Therefore, it is to be reiterated that when a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the true ownership of an adverse claimant to immovable property, the burden of proof rests fairly on him to establish the *adverse possession* by strong and cogent evidence.

When a co-owner claims prescriptive title against other co-owners, proof of undisturbed, uninterrupted, adverse, or independent possession for more than ten 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' (*vide CA/549/2000/F, CA Minutes of 04.12.2018 – per* Samayawardhena, J).

When a co-owner claims prescriptive title to the entirety of the subject matter against the other co-owners such as in the instant case, there is an onus cast on them to establish the fact that they had prescribed to the entire corpus by adverse possession against other co-owners for at least ten years from the date of ouster or something equivalent to ouster.

It is salient to note that the 1st, 2nd, and 3rd Appellants relied upon the title deed marked 1V9/P6, wherein their predecessor in title, Wedikkara Dayawansa Silva had purchased undivided rights from the corpus in 1960. Hence, the position took up by these Appellants (Point of contest No. 05. Vide p. 132 of the Appeal brief) stating that Wedikkara Dayawansa Silva was in exclusive possession of the entirety of the subject matter from 1960 is devoid of merits. Since the predecessor in title of the Appellants had purchased undivided rights from the corpus, the Appellants are precluded from claiming prescriptive title to the *entirety* of the subject matter in the absence of *expressed intention of ouster* of the other co-owners. Vide ***Wickramaratne and Another v. Alpenis Perera*** *(supra).*

It is pertinent to be noted that the 2nd Appellant in cross-examination had categorically admitted the fact that they claim

entire corpus upon the deed marked 1V9/P6 (vide Appeal brief page 182, 183 & 194).

In ***Juliana Hamine v. Don Thomas*** *[1957] 59 NLR 546*, it was held that,

> *"When a witness giving evidence of prescriptive possession states 'I possessed 'or 'We possessed', the Court should insist on those words being explained and exemplified."*

In the case of ***Sirajudeen and Two Others v. Abbas*** *[1994] 2 Sri LR 365*, the Supreme Court, in an exhaustive manner explained how a claim of prescriptive title could be established before the court of law, which reads thus,

> *"Where the evidence of possession lacked consistency, the fact of occupation alone or the payment of Municipal rates by itself is insufficient to establish prescriptive possession.*
>
> *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.*
>
> *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.*
>
> *As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and*

the question of possession has to be decided thereupon by Court.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner."

The attention of this Court is drawn to the fact that the Appellants had submitted the voters list from 1965 to 1994 marked 1V2-1V10 in order to prove the fact that they were in possession of the subject matter. Indeed, the Appellants were in possession as co-owners, but the requirements of adverse possession and the ouster against the other co-owners have not been established with those documents. Moreover, the Appellants totally failed to establish any *overt act* as far as the common co-owned rights are concerned. As it is enunciated in ***Sirajudeen*** *(supra)*, mere bare statement of the 2nd Appellant stating that the Appellants had acquired prescriptive title to the subject matter is inadequate to succeed in their purported claim of prescriptive title.

Further, this Court, in its order dated 29.11.2019, permitted the Appellants to produce fresh evidence in appeal. Accordingly, the appellants submitted the entire case record of a partition action bearing No. 6202/P in the District Court of Kalutara. It is apparent that the said partition action was instituted to partition lot 8 in plan 344 marked 1V10 which is situated adjacent to the corpus in this case. As such, it appears to this Court that the aforesaid fresh evidence submitted by the Appellants is not relevant to substantiate the claim made by the Appellants in this case.

It is to be noted that the 5th Appellant is not a co-owner to the subject matter. However, the 5th Appellant has not adduced evidence to establish his claim of prescriptive title to the subject matter.

Conclusion:

For the foregoing reasons, in my view, there is no basis to interfere with the judgment of the learned District Judge of Kalutara dated 06.10.1999. Thus, the appeal is dismissed, and the impugned judgment is affirmed.

It is the considered view of this Court that the Respondent in this case could not reap the fruits of the impugned judgment for the last 22 years due to the instant frivolous appeal. Therefore, the appellants are ordered to pay a sum of Rs. 45,000/- to the Respondent as costs of this appeal.

The Registrar is directed to dispatch the judgment along with the original case record to the District Court of Kalutara.

JUDGE OF THE COURT OF APPEAL

K. K. A. V. SWARNADHIPATHI, J.

I Agree.

JUDGE OF THE COURT OF APPEAL