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

1. Pitiwela Kankanange Polier Jayathilake
2. Pitiwela kankanange Don Mervin Edgar Jayathilake
   Both of Mahagedara, Galhena, Beruwala.

Plaintiffs

CA/860/99 (F)
DC Kalutara P-6386

- Vs -

1. Pitiwela Kankanange Don Richard Jayathilake
2. Pitiwela Kankanange Don Chamus Jayathilake
   Both of Galhena, Beruwala.
3. Hewawasam Nanayakkarage Upali Padmasiri Jayasekara
   No.22, Sri Dharmavijayarama Mawatha, Pitaramba, Bentota.
4. Charlotte Jayathilake
5. Ananda Jayathilake
   Both of No.54/C, Santha Nampitiya Road, Ambuldeniya, Nugegoda.
6. Matilda Jayasinghe
7. Punsiri Mirando
8. Punyawathie De Soyza
   All of Galhena, Beruwala.
9. Pitiwela Kankanange Harriet Jayathilake
   Mahagedara, Galhena, Beruwala.
10. Magodage Dona Podinona
11. Gurunnanselage Don Hermon Jayasinghe
12. Gurunnanselage Don Lal Jayasinghe

13. Gurunnanselage Sunil Jayasinghe
14. Gurunnanselage Don Ananda Jayasinghe
15. Gurunnanselage Anura Jayasinghe
16. Gurunnanselage Hilda Jayasinghe
17. Gurunnanselage Leslie Jayasinghe
18. Kumbalatara Arachchige Dona Premawathie
19. Rosaline Thewarapperuma
20. Kalutara Gurunnanselage Lily Jayasinghe

    Of Galhena, Beruwala.

Defendants

Between

1. Pitiwela Kankanange Don Polier Jayathilake
2. Pitiwela Kankanange Don Mervin Edgar Jayathilake

   Both of Mahagedara, Galhena, Beruwala.

Plaintiffs – Appellants

And

1. Pitiwela Kankanange Don Richard Jayathilake
2. Pitiwela Kankanange Chamus Jayathilake

   Both of Galhena, Beruwala.
3. Hewawasam Nanayakkarage Upali Padmasiri Jayasekara

   No.22, Sri Dharmavijayarama Mawatha, Pitaramba, Bentota.
4. Charlotte Jayathilake
5. Ananda Jayathilake

Both of No.54/C, Santha Nampitiya Road, Ambuldeniya, Nugegoda.

6. Matilda Jayasinghe
7. Punsiri Mirando
8. Punyawathie De Soyza
   All of Galhena, Beruwala.
9. Pitiwela Kankanange Harriet Jayathilake
   Mahagedara, Galhena, Bruwala.
10. Magodage Dona Podinona
11. Gurunnanselage Don Hermon Jayasinghe
12. Gurunnanselage Don Lal Jayasinghe
13. Gurunnanselage Sunil Jayasinghe
14. Gurunnanselage Don Ananda Jayasinghe
15. Gurunnanselage Anura Jayasinghe
16. Gurunnanselage Hilda Jayasinghe
17. Gurunnanselage Leslie Jayasinghe
18. Kumbalatara Arachchige Dona Premawathie
19. Rosaline Thewarapperuma
20. Kalutara Gurunnanselage Lily Jayasinghe
    All of Galhena, Beruwala.

Defendants – Respondents

Before: C.P. Kirtisinghe – J
Mayadunne Corea – J

Counsel: P.K.P. Perera for the 2nd Plaintiff – Appellant
S. Dassanayake for Substituted 7A Defendant – Respondent

Argued On : 10.08.2022
Decided On : 06.10.2022

C.P. Kirtisinghe – J

The Plaintiffs-Appellants have preferred this appeal from the judgement of the learned District Judge of Kalutara dated 29.07.1999.

When this matter was taken up for argument the parties informed Court that they do not wish to make oral submissions and invited Court to dispose the matter by way of written submissions. We have taken into consideration the written submissions filed by the parties.

The Plaintiffs-Appellants (hereinafter referred to as the Plaintiffs) had instituted this partition action to partition the land called Thalagahawatta alias Gedarawatta which is more fully described in the schedule to the plaint. The Commissioner in this case, S.L.P. Satharasinghe Licensed Surveyor had done the preliminary survey and tendered to court the preliminary plan marked X and the report marked X1. In that plan the corpus is depicted as lots 1 and 2.

There was no corpus dispute in this case and the learned District Judge has decided that the corpus is depicted as lots 1 and 2 in the preliminary plan. There was no pedigree dispute between the co-owners of the corpus. Against the paper title of the co-owners the 7th and the 8th Defendants had claimed a prescriptive right to lot no. 1 of the corpus. At the trial issues no. 10, 11 and 12 had been raised on that basis. Those issues read as follows;

(10) මිනින්දෝරු සතරසිංහ මහතාගේ අංක 1015 දරණ පිඹුරේ කැබලි අංක හි දීර්ඝ කාලීනව හා අඛණ්ඩව නිරවුල්ව භුක්ති විඳීමෙන් 7,8 විත්තිකරුවන් විසින් භුක්තියට සවි කර ගෙන ඇත්ද?

(11) එහි අංක 1 දරණ කැබැල්ලේ තිබෙන සියළු වගාවන් සහ වැඩි දියුණු කිරීම් එම අදාළ විත්තිකරුවන්ට පමණක් හිමි විය යුතුද?

(12) ඉහත පැන වලට 'ඔව්' කියා උත්තර ලැබෙන්නේ නම් එකි කැබලි අංක 1 ට 7,8 විත්තිකරුවන් විසින් දීර්ඝ කාලීනව භුක්ති විඳ භුක්තියට සවි කර ගෙන ඇති බවට තීන්දු ප්‍රකාශයක් ලබා ගත හැකිද?

By answering those three issues in the affirmative the learned District Judge has come to the conclusion that the 7th and 8th Defendants had established a prescriptive right to lot no. 1.

It is settled law 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 fairly and squarely on him to establish his prescriptive right – (**Sirajudeen and Two others v Abbas [1994] 2**

SLR 365, **I. De Silva v Commissioner General of Inland Revenue 80 NLR 292**, **Peynis v Pedro 3 SCC 125**, **Chelliah v Wijenathan 54 NLR 337**).

To establish a prescriptive right to the corpus, the 7th and the 8th Defendants must prove on a balance of probability of evidence that they had been in undisturbed and uninterrupted possession of the corpus adverse to the rights of the co-owners or independent of the rights of the co-owners for a period exceeding 10 years prior to the institution of the action.

Walter Perera in his Laws of Ceylon 2nd ed at page 396 states thus:

"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 the court."

The 1st Plaintiff in his examination in chief had stated that the 7th and 8th Defendants came to reside in the corpus with his leave and license. He had stated so at the commencement of the cross examination also. That is the very foundation of the case of the Plaintiffs. But later the 1st Plaintiff had repeatedly stated that the 7th and 8th Defendants did not come into occupation of the corpus with his leave and license. The learned District Judge has taken that factor into consideration.

ප්‍ර : විත්තිකරුවන් ඔතනට ආවේ කැමැත්තෙන් නොවේ?

උ : නොවේ.

ප්‍ර : තමාගේ අවසරයක් ලබාගෙන නොවේ?

උ : නොවේ.

ප්‍ර : තමා පැමිණිල්ලේ 28 වෙනි ඡේදයේ සඳහන් කලේ බොරුවක්, අවසරය ලබාගෙන ආවා කියන එක බොරුවක්?

තමාට යෝජනා කරනවා තමාගේ අවසරය ලබාගෙන නොවේ ඔතනට අවේ, පදිංචි උනේ කියා?

උ : මගේ අවසරය පිට නොවේ.

This is a material contradiction in the evidence of the 1st Plaintiff. Later he had made a desperate attempt to adjust his evidence by saying that he gave his

consent later. There is an unsatisfactory nature in that evidence also. According to the 1st Plaintiff, the 7th and 8th Defendants had told him that one Upali Jayathilake had given them permission to occupy the premises. But according to the 1st Plaintiff, Upali was not a co-owner of the corpus. The 1st Plaintiff admitted that he did not tell the 7th and 8th Defendants that Upali did not have rights in the corpus. The 1st Plaintiff had also admitted that he did not ask Upali why he gave permission to the 7th and 8th Defendants. This conduct of the 1st Plaintiff is highly improbable. On the other hand, if the 7th and 8th Defendants had got permission from Upali and they did not know that he was not a co-owner, there is no necessity for them to get permission from the 1st Plaintiff later. For the aforesaid reasons, the evidence of the 1st Plaintiff regarding the character and nature of possession of the 7th and 8th Defendants is wholly unreliable. Therefore, the learned District Judge was justified in rejecting the evidence of the 1st Plaintiff and refusing to accept same in a situation where there was no independent corroboration.

On the other hand, the 8th Defendant had stated that her husband the 7th Defendant and herself came into occupation of the corpus in 1972 without any leave and license of anybody and no one gave them permission to occupy the premises. They had come and resided in the dilapidated house which was there in the corpus after repairing it. She had stated so in her evidence in chief and she had maintained that position throughout the cross examination. Her evidence regarding the character of possession was not shaken in cross examination. The learned District Judge had preferred to accept her evidence and he was justified in doing so. The learned Counsel for the Plaintiffs-Appellants in his written submissions has drawn our attention to the evidence of the defense witness Laksiri – the Grama Niladhari of the area who testified to the effect that the 7th and 8th Defendants had told him that they were occupying the house in the capacity of tenants. The learned District Judge in his judgement has stated that the Counsel for the Defendants had requested Court to disregard that evidence. Therefore, it is the submission of the learned Counsel for the Plaintiffs-Appellants that it may have persuaded the learned District Judge not to consider the aforesaid evidence in favour of the Plaintiffs. But as the learned District Judge has correctly observed, it is not the case of the Plaintiffs that the 7th and 8th Defendants are residing in the capacity of tenants. Therefore, no benefit could accrue to the Plaintiffs' case out of that evidence.

The learned District Judge has come to the conclusion that the 7th and 8th Defendants had come into possession of the corpus without the leave and

license of the 1st Plaintiff and on a balance of probability of evidence, the learned District Judge was justified in coming to that conclusion.

The next question that has to be taken into consideration is whether the 7th and 8th Defendants were in exclusive possession of the corpus. The 1st Plaintiff had admitted that the 7th and 8th Defendants were residing in the corpus since 1974 which means that the 7th and 8th Defendants had been in uninterrupted possession for more than 10 years prior to the institution of the partition action. The question that has to be considered is whether their possession was undisturbed and whether they were in exclusive possession or their possession was disturbed by the 1st Plaintiff. The 7th and 8th Defendants cannot establish an undisturbed possession if the 1st Plaintiff also had possessed the corpus along with the 7th and 8th Defendants. The 1st Plaintiff in his evidence had stated that he took the produce of the corpus while the 7th and 8th Defendants were residing in the corpus. On the other hand, the 8th Defendant had stated that the 1st Plaintiff and the other co-owners never possessed the corpus and she possessed the corpus exclusively and took the entire produce. The learned District Judge who had seen and heard the witnesses has preferred to accept the 8th Defendant's version and has refused to accept the 1st Plaintiff's version and he was justified in coming to that conclusion. After taking into consideration the infirmities of the evidence of the 1st Plaintiff regarding the plantations in the corpus, the learned District Judge has refused to accept the evidence of the 1st Plaintiff that he possessed the corpus. The 1st Plaintiff in his evidence had stated that he leased out the coconut trees in the corpus. But as the learned District Judge has correctly observed the Plaintiffs had failed to adduce evidence to establish that fact. In any event, the learned District Judge could not have acted on that evidence in view of the unsatisfactory nature of the evidence of the 1st Plaintiff specially in a situation where he had rejected the evidence of the 1st Plaintiff regarding the character of possession of the 7th and 8th Defendants which gives rise to the concept of the indivisibility of the credibility of a witness.

The learned Counsel for the Plaintiffs-Appellants in his written submissions has drawn our attention to the evidence of the defense witness Mendis – another Grama Niladhari of the area. In his examination in chief, this witness had stated as follows;

ප්‍ර : එවිට එතන පදිංචි වෙලා සිටියේ මේ අය විතරයි?

උ : ඔව්.

ප්‍ර : වෙන අය භුක්ති වින්දාද කියා කියන්න බැහැ?

උ : ඔව්.

Therefore, that witness had clearly stated no one else other than the 7th and 8th Defendants possessed the corpus. In his examination in chief this witness had never stated that the 1st Plaintiff possessed the corpus. But in his cross examination this witness had stated that the 1st Plaintiff possessed the corpus and he plucked coconuts in the five coconut trees situated in the land. This is a material contradiction in the evidence of this witness and the learned District Judge could not have acted on that evidence in favour of the Plaintiffs.

The learned Counsel for the Plaintiffs-Appellants in his written submissions had drawn our attention to Section 18(2) of the Partition Law No. 21 of 1977. Under that provision, the preliminary survey plan and the report in a partition action may, without further proof, be used as evidence of the facts stated or appearing therein. Therefore, what the surveyor had reported in his report is admissible in evidence without further proof. In the surveyor report marked X1, the surveyor has reported that only the Plaintiffs and the Defendants other than the 7th and 8th Defendants claimed for the older plantation in lot 1. According to that report, the 7th and 8th Defendants had not claimed for the older plantation. As against that evidence, the 8th Defendant had stated in her evidence that the 7th and 8th Defendants claimed for that plantation and the surveyor had not reported that fact to court. The 7th and 8th Defendants had mentioned that fact in their Statement of Objections and therefore, that evidence can be believed.

Therefore, on the balance of probability of the evidence the learned District Judge could have come to the conclusion that the 7th and 8th Defendants had been in exclusive possession of the corpus and they had been in uninterrupted and undisturbed possession of the corpus for more than 10 years prior to the institution of this partition action.

The learned Counsel for the Plaintiffs-Appellants has cited the case of **Sirajudeen and Two others v Abbas [1994] 2 SLR 365**. The facts of that case can be distinguished from the facts of this case. In **Sirajudeen's case** there was no clear proof of a starting point for the acquisition of the prescriptive right. In this case there is a clear proof of the starting point of adverse possession. In **Sirajudeen's case** there was no consistency in the claim in regard to the period of occupation of the premises in suit and the period of possession pleaded varied from answer to answer which naturally affected the credibility of the

Defendant's story of occupation and there was no consistency in evidence with regard to the period of possession. Those infirmities are not there in this case.

Section 3 of the Prescription Ordinance No. 22 of 1871 reads as follows;

"Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs."

Walter Perera in his Book 'The Laws of Ceylon' 2nd ed (1913) at page 385 states as follows;

As to "adverse possession," the words in section 3 of the Ordinance, "a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred," contain a definition, and not merely an illustration, of what is referred to in the section as "possession by a title adverse to or independent of that of the claimant".

In the case of **Kirihamy Muhandirama v Dingiri Appu (1903) 6 NLR 197**, Moncreiff J held as follows,

"It would appear then that, in order that a person may avail himself of section 3 of the Prescription Ordinance, No. 22 of 1871 –

(1) Possession must be shown from which a right in another person cannot be fairly or naturally inferred.
(2) Possession required by the section must be shown on the part of the party litigating or by those under whom he claims."
(3) The possession of those under whom the party claims means possession by his predecessors in title.
(4) Judgment must be for a person who is a party to the action and not for one who sets up the possession of another person who is neither his possessor in title nor a party to the action."

The learned District Judge has come to the correct conclusion that the 7th and 8th Defendants had entered into possession of the corpus in dispute without the permission of the Plaintiffs. Therefore, their possession is not permissive user. A right in another person cannot be fairly and naturally inferred from that possession. The rights of the Plaintiffs and the other co-owners cannot be inferred from that possession. The 7th and 8th Defendants had improved the old house which was there without the permission of the Plaintiffs and other co-owners and without their objection. The 7th and 8th Defendants had planted the land and taken out the produce of the existing old plantation without the permission of the Plaintiffs and other co-owners and without their objections. The Plaintiffs and the other co-owners had made no attempt to prevent those actions of the 7th and 8th Defendants and they had not complained to the Police or to the Grama Sevaka of the area against those acts. That shows that the 7th and 8th Defendants had possessed the corpus with the intention of holding the land as owner (*animus domini*). They had been in possession for more than 10 years and the possession was uninterrupted and undisturbed and it was exclusive possession. The Plaintiffs and the other co-owners of the corpus had not been in possession. Therefore, on the balance of probability of evidence one can come to the conclusion that the 7th and 8th Defendants had established a prescriptive right to lot no. 1 of the corpus.

For the aforementioned reasons, we see no merit in these two appeals. We are of the view that the learned District Judge has come to a correct conclusion regarding the prescriptive claim of the 7th and 8th Defendants and we see no reason to interfere with those findings. Therefore, we affirm the judgement of the learned District Judge dated 29.07.1999 and dismiss this appeal. In the circumstances of this case, we make no order for cost.

Judge of the Court of Appeal

Mayadunne Corea – J
I Agree

Judge of the Court of Appeal