

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

Rajapaksha Mudiyansele Rajapaksha
Muthubanda
No. 22, Uduwara, Demodara.

Plaintiff

-Vs-

CA 718/99(F)
Badulla DC P80/89

1. R. M. Appuhamy,
No. 156, Mapakadawewa,
Mapakada.
2. R. M. Punchibanda
Pahalawelgolla, Uduwara,
Demodara.
3. Nanda Rajapaksha
4. Udeni Rajapaksha
5. Parakrama Rajapaksha
6. R. M. Rajapaksha
7. R. M. B. Rajapaksha
3rd & 7th Defendants of
Walasbeda Kade, Uduwara,
Demodara.
8. R.M. Abeykone
No. 22, Uduwara,
Demodara.

Defendants

AND NOW

R.M. Abeykone
No. 22, Uduwara,
Demodara.

8th Defendant-Appellant

-Vs-

1. R.M. Appuhamy
No. 156, Mapakadawewa.
Mapakada.
2. R.M. Punchibanda
Pallewelgolla, Uduwara,
Demodara. (Deceased)
- (2A) D. H. M. Kumarihamy,
No. 22, Pahalawelgolla,
Uduwara, Demodara.
- (2B) R. M. Rajapaksha,
No. 218/5, Pathiragoda Road,
Pamunuwa, Maharagama.
- (2C) R. M. Pemawathie.
Kehelpotha, Girandurukotte.
- (2D) R. M. Siriyawathie,
No. 22, Pahalawelgolla,
Uduwara, Demodara.
- (2E) R.M. Kamalawathie
No.22, Pahalawelgolla,
Uduwara, Demodara.
- (2F) R.M. Gnanawathi
No.22, Pahalawelgolla,
Uduwara, Demodara.
- (2G) R.M. Karunawathie
No.22, Pahalawelgolla,
Uduwara, Demodara.

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- (2H) R.M. Wimal Rajapaksha
No.22, Pahalawelgolla,
Uduwara, Demodara.
- (2I) R.M. Amarawathie
No.22, Pahalawelgolla,
Uduwara, Demodara.
- (2J) R.M. Nandawathie,
No. 23/27, Badulupitiya Road,
Badulupitiya, Badulla.
3. Nanda Rajapaksha
4. Udeni Rajapaksha
5. Parakrama Rajapaksha
6. R.M. Rajapaksha
7. R.M.B. Rajapaksha
3rd and 7th Defendants of
Walasbeddakade, Uduwara,
Demodara.

Defendants-Respondents

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

Counsel: W. D. Weeraratne for the 8th Defendant-Appellant.
Shymal A. Collore with A. P. Jayaweera and P. S. Amarasinghe for the
Substituted Plaintiff-Respondent, Substituted 1B Defendant-
Respondent and Substituted 2A, 2B, 2D, 2E, to 2J Defendant-
Respondents

Argued on: 18.10.2022

Decided On: 21.11.2022

C. P. Kirtisinghe – J.

The 8th Defendant Appellant has preferred this appeal from the judgement of the learned District Judge of Badulla dated 23.10.1998.

The Plaintiff – Respondent (hereinafter referred to as the Plaintiff) had instituted this partition action to partition the land called “Rambuk Hena” in extent of 4 acres 3 roods and 30 perches which is more fully described in the schedule to the plain. The Commissioner in this case M. Fuad Ismail LS who had done the preliminary survey had produced the plan no. 3713 which was marked V1 at the trial. There is no corpus dispute in this case. At the commencement of the trial parties had agreed to the identity of the corpus. Therefore, one can come to the conclusion that the land shown in the preliminary plan is the corpus in this case.

According to the pedigree disclosed by the Plaintiff and the evidence of the Plaintiff the original owner of the land was one Sudukuma. By the deed no. 6727 marked 371 the aforesaid Sudukuma had transferred her rights to five of her grandchildren namely Appuhamy – the 1st Defendant, Sudu Banda, Punchi Banda – the 2nd Defendant, Kiri Banda and Muthu Banda – the Plaintiff who became entitled to a 1/5th share each. Sudu Banda who entered the priesthood later had died without a last will and his rights had devolved on the four brothers. Kiri Banda had died leaving 3rd - 7th Defendants as his heirs. At the trial issues no. 1,2,4,5,6 and 7 were raised on behalf of the Plaintiff on that basis. There was no pedigree dispute among the co-owners and the learned District Judge was justified in accepting the devolution of title shown by the Plaintiff and deciding the undivided rights of the parties accordingly.

The 8th Defendant-Appellant in his joint statement of claim with 3rd - 7th Defendants had prayed for the following reliefs.

අ. 03 සිට 07 දක්වා විත්තිකරුවන්ට පැමිණිල්ලේ ප්‍රකාර ඔවුන්ට නියමිත නොබෙදූ කොටස් වෙනුවෙන් බෙදා වෙන්කළ කොටස් හිමිකර දීමේ බෙදුම් නඩු තීන්දු ප්‍රකාශයක්ද,

ආ. මෙම බෙදුම් නඩුවේ බෙදුම් නඩු තීන්දු ප්‍රකාශයක් ප්‍රකාශ කිරීමේදී 08 විත්තිකරුගේ අයිතිවාසිකම් වෙනුවෙන් මෙහි පහත උප ලේඛණයෙන් විස්තර කරන ඉඩම සහ එකී අදාල පිඹුරේ පෙන්නුම් කර ඇති 'ඒ' අක්ෂරය දරණ ගොඩනැගිල්ලද 08 විත්තිකරුට හිමිකර දීමේ බෙදුම් නඩු තීන්දු ප්‍රකාශයක්ද,

ඇ. තවද යම් හෙයකින් පැමිණිල්ලේ සඳහන් ඉඩම හා මෙහි පහත උපලේඛණයෙන් විස්තර කෙරෙන ඉඩම සම්බන්ධව අවිනිශ්චිතයක් ඇති වන්නේ නම්, 08 විත්තිකරුට අයත් දේපල සහ එකී ගොඩනැගිල්ල මෙම බෙදුමෙන් ඉවත් කරලීමේ නියෝගයක්ද,

In his statement of claim the 8th Defendant-Appellant had stated that her sister one Bandara Manika and the children of Kiri Banda had gifted the land which is described in the schedule to the statement of claim together with the house standing there on to the 8th Defendant on the deed of gift bearing no. 15090 dated 04.07.1986. Further he has averred that he has acquired a prescriptive right to the aforesaid property by long and continued possession. He has further stated that the land described in the schedule of his statement of claim is a part of the corpus in this case as shown in the preliminary plan and the 8th Defendant is residing in the house which is shown as 'A' in the preliminary plan.

At the trial the following issues had been raised on behalf of the 8th Defendant.

09. 8වන විත්තිකරුගේ 4 වන ඡේදයේ සඳහන් පරිදි ප්‍රසිද්ධ නොකාරිස් පී. වනසුරිය මහතා විසින් 1986 ජූලි මස 04 වන දින ලියා සහතික කරන ලද අංක: 15090 දරණ තැඟි ඔප්පුවෙන් 8 වන විත්තිකරු මෙම හිමිකම් ප්‍රකාශයේ උප ලේඛණයේ සඳහන් ඉඩම සහ නිවස මිලදී ගෙන ඇද්ද?

10. මෙම නඩුව පවරන අවස්ථාවේදී 8 වන විත්තිකරුගේ අයිතිවාසිකම් දැන දැනත් ඔහු නඩුවට පාර්ශවකරුවෙක් වශයෙන් ඇතුළත් කර නොමැත්තේද?

11. මෙම නඩුවට ගොනු කර ඇති මිනින්දෝරු වාර්ථාවේ සඳහන් 'ඒ' අක්ෂරය වශයෙන් ලකුණු කර ඇති නිවස 8 වන විත්තිකරු උපන් දා සිට දීර්ඝකාලීන භුක්තියෙන් අයිතිවාසිකම් ලබා භුක්ති විදගෙන එනු ලබන්නේද?

12. මෙම නඩුවට අදාළ දේපල බෙදා වෙන් කිරීමේදී පාර්ශවකරුවන් අතර දේපල බෙදා වෙන් කරන විට නඩුවට ගොනු කර ඇති සැලැස්මේ සඳහන් 'ඒ' අක්ෂරයෙන් සඳහන් නිවස සහ ඉඩම 8 වන විත්තිකරු දීර්ඝ කාලීනව භුක්ති විදින නිසා අයිතිවාසිකම් ලැබීමට ඔහුට හිමිකමක් තිබේද?

13. ඉහත ඇති 9 සිට 12 දක්වා හඬ කරුණු වලට "එසේය" යනුවෙන් පිළිතුරු දුනහොත් 8 වන විත්තිකරු විසින් ගොනුකර ඇති හිමිකම් ප්‍රකාශයේ සහන ලබා ගැනීමට හිමිකමක් තිබේද?

The 8th Defendant had averred in his statement of claim that he had acquired a prescriptive right to the property described in the schedule to the statement of

claim. In the prayer he had claimed for the land described in the schedule to the statement of claim and to the house standing there on. He had claimed for the aforesaid land in lieu of his rights based on his paper title and not on prescription. However, at the trial the issue no.12 had been raised on the basis that the 8th Defendant is entitled for the land and the house on prescription and not on paper title. Although the 8th Defendant had averred in his statement of claim that he had acquired a prescriptive right to the land and the house in his prayer he had not prayed for an exclusion on that basis. However, the issue no.12 had been raised without an objection and therefore that issue can be taken into consideration.

When one examines the contents of the statement of claim of the 8th Defendant it appears that the averments contained therein are self-contradictory. In paragraph 01 the 8th Defendant says that he admits the undivided rights shown by the Plaintiff to the 3rd - 7th Defendants. Thereafter the 8th Defendant says that the land described by the 8th Defendant in his statement of claim is a portion of the corpus in this case. On that basis he claims rights in the corpus and claims for the land described in his statement of claim in lieu of his rights. If that is the position of the 8th Defendant, he cannot admit the rights shown to the 3rd- 7th Defendants by the Plaintiff. If the 8th Defendant has rights in the corpus and if he is entitled to the land described in the statement of claim of the 8th Defendant in lieu of those rights then the rights shown to the 3rd - 7th Defendants in Plaintiff's pedigree has to be reduced. The name of the corpus in this case is "Rambuk Hena". In the deed marked 31 it is described as "Rambuk Hena". According to the averments in the statement of claim of the 8th Defendant he had purchased rights in a land called "Mahakapalle Kale". The 8th Defendant has not satisfied the Court that it is a part of the corpus. He had not taken out a commission and shown the location of the land in the preliminary plan. The learned District Judge has come to the correct conclusion that the land claimed by the 8th Defendant is a different land. In any event the 8th Defendant has not produced the deed no. 15090 dated 04.07.1986 upon which he claim for those rights. Therefore, the Court cannot come to the conclusion that the 8th Defendant has undivided rights in the corpus. Therefore, the 8th Defendant cannot be treated as a co-owner for the purpose of taking into consideration the prescriptive rights claimed by him.

However, at the trial the 8th Defendant had changed his position and taken up a different stand which is materially different to the case he has placed before Court by his statement of claim. In evidence he has stated as follows;

“ඒ අක්කර 4යි රූඩ් 3යි පර්චස් 30යි විශාල ඉඩමක් මා විසින් අයිතිවාසිකම් කියන වී. 01 ලේඛණයේ සඳහන් කර තිබෙන අක්කර 2යි රූඩ් 1යි පර්චස් 9ක් ඉඩමක් එක ස්ථානයේ පිහිටා තිබෙන්නේ. එකම ප්ලැන් එකෙන් කොටස් වෙන් කර තිබෙන ඉඩම් දෙකක්. මගේ අයිතිය පෙන්වුම් කර තිබෙන ඉඩම වෙන එකක්. පැමිණිලිකරු අක්කර 4යි රූඩ් 3යි පර්චස් 30ක ඉඩම වෙනම ඉඩමක්.”

The 8th Defendant had stated in his evidence that the land shown by the Plaintiff as the corpus in this case and the land claimed by the 8th Defendant are two different lands. The two lands are situated close to each other but the two lands are separately shown in a plan. Therefore, the 8th Defendant had stated that the land described in the statement of claim of the 8th Defendant is a different land. Therefore, it cannot be a portion of the corpus. However, the 8th Defendant had taken up the position that the land claimed by him or at least a portion of it had come into the corpus at the preliminary survey when he testified as follows;

“ඒ නිවස තිබෙන කොටස 'වී 1' වශයෙන් ලකුණු කර තිබෙන ලේඛණයට ඇතුළු වෙලා තිබෙනවා”.

However, the 8th Defendant had not taken out an alternative commission either to the Commissioner of the case or to the Survey General and shown that the land claimed by him had been included into the corpus at the preliminary survey and claimed for an exclusion of that portion on that basis.

The Prescriptive Rights of the 8th Defendant

Issue no.12 had been raised at the trial by the 8th Defendant on the basis that he had acquired a prescriptive right to the land and the house shown as 'A' in the preliminary plan (ඒ අක්ෂරයෙන් සඳහන් නිවස සහ ඉඩම) by long and continued possession. The issue itself is vague. When he refers to the word 'ඉඩම' it is not clear whether he is claiming a prescriptive right to the entirety of the corpus in this case or whether he is claiming a prescriptive right to the land described in his statement of claim. But according to the averments in the statement of claim of the 8th Defendant it is apparent that the 8th Defendant is claiming for a prescriptive

right to the land described in his statement of claim, according to him which he had purchased on the deed no. 15090.

The burden of proving the prescriptive right to the corpus or to a portion of it is on the 8th Defendant. To satisfy that burden the 8th Defendant must prove on a balance of probability of evidence that he had been in possession of the land undisturbedly and uninterruptedly and adverse to the rights of the co-owners of the corpus or independent of their rights for a period exceeding 10 years prior to the institution of the partition action.

In the course of his submission the learned Counsel for the 8th Defendant- Appellant has drawn our attention to the famous case of **Thilakarathne Vs Bastian 21 NLR 12** and submitted that the 8th Defendant had been living in the house shown as 'A' for a very long period of time. That case has no application to this situation. Thilakarathne's case was a case between co-owners and one co-owner was attempting to establish a prescriptive right to the corpus against the other co-owners. There was no evidence of any act to show an ouster. The Court held that under the circumstances of that case a counter presumption of ouster can be drawn from the long and continued possession of the occupier. In this case the 8th Defendant is not a co-owner of the corpus. Therefore, the question of prescription among the co-owners will not arise in this case. Therefore, the 8th Defendant has to be treated as the 3rd party or a trespasser for the purpose of considering his prescriptive claim.

However, the prescriptive claim of the 8th Defendant must necessarily fail for the following reasons.

It is settled law that a title acquired by prescription must be limited to the actual area which was possessed. In other words, the party claiming the prescriptive right must be specific of the portion of land to which he claims a prescriptive right. That portion of land must be clearly identifiable and certain. A party cannot claim for a prescriptive right to an uncertain portion of land. Prof. G.L. Peiris in his **"The Law of Property in Sri Lanka Volume I"** (revised 2nd edition 3rd re-print 2009) at page 88 states thus;

"The general principle is that a title acquired by prescription must be limited to the actual area of which possession is had".

In this case the 8th Defendant had not shown the area which he has possessed and the portion of land to which he is claiming a prescriptive right. In his statement of claim the 8th Defendant states that he had acquired a prescriptive right to the land described in the schedule to his statement of claim. It is to that land that the 8th Defendant is claiming a prescriptive right. But the 8th Defendant had not shown that land in the preliminary plan. If the 8th Defendant had acquired a prescriptive right to that land which is smaller than the corpus or to a portion of that land which had been surveyed as a part of the corpus in this case the 8th Defendant can only ask for an exclusion of that portion. The Plaintiff is entitled to partition the balance portion of the land. Therefore, it is essential for the 8th Defendant to take up a commission and show that portion of land in the preliminary plan, which the 8th Defendant has not done. Therefore, the prescriptive claim of the 8th Defendant must fail.

It is the case of the 8th Defendant that the ancestral house of the family in which the 8th Defendant resides is situated within the portion of land to which the 8th Defendant is claiming a prescriptive right. It is common ground that the 8th Defendant is a brother of the Plaintiff and the 1st and 2nd Defendants, late Sudu Banda and late Kiri Banda. Kiri Banda is the father of 3rd - 7th Defendants and the old house situated in the corpus is the ancestral home of all those parties. In view of the close relationship that exists between the parties the 8th Defendant could not have had an adverse possession against the co-owners of the corpus. There is nothing to show that the relationship between the parties has become hostile.

As the 8th Defendant is also a member of the same family it can be presumed that the 8th Defendant was living in the ancestral home with the consent of his family members and with the leave and license of the co-owners who are his immediate family members. Therefore, it should be presumed that the 8th Defendant continuous to occupy the house on the same footing until by some overt act the 8th Defendant manifests his intention of occupying in another capacity. That is the principle laid down in the famous judgement of **Maduwanwela Vs Eknaligoda (1898) 3 NLR 213**. In that case Bonser- CJ observed as follows;

“A person who is let into occupation of property as a tenant or as a licensee must be deemed to continue to occupy on the footing on which he was admitted, until

by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation”.

But in this case, there is no evidence of such an overt act on the part of the 8th Defendant and the learned District Judge has come to the correct finding that the 8th Defendant had failed to prove that he had adverse possession against the other parties.

For the aforementioned reasons we see no merit in this appeal. We are of the view that the learned District Judge has come to a correct conclusion in this case and we see no reason to interfere with those findings. Therefore, we affirm the judgment of the learned District Judge dated 23.10.1998 and dismiss this appeal in the circumstances of this case we make no order for costs.

Judge of Court of Appeal

Mayadunne Corea – J.

I Agree

Judge of Court of Appeal