

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

**CA 657/99 (F)
DC Kalmunai
Case No. 970/L**

1. Kunchithamby Sellathangham
2. Pammakutty Asupathan
3. Pammakutty Illayapillai
4. Pammakutty Thankamany
5. Pammakutty Pushparajah
6. Pammakutty Ramanathan
7. Pammakutty Pushparatnam
8. Pammakutty Saroja
9. Pammakutty Thevarajah
10. Pammakutty Thankamalar
11. Pammakutty Kala

All of Ward No. 1
Chenaikkudiruppu

Substituted-Plaintiffs

Vs

1. Sinnathamby Rasia Alias
Kanthasamy

2. Kunchithamby Rasathy

Both of them Ward No. 1,
Chenakudiruppu

Defendants

And

In the matter of an Appeal under
Section 755 of the Civil Procedure
Code

Between

1. Kunchithamby Sellathangham
2. Pammakutty Asupathan
3. Pammakutty Illayapillai
4. Pammakutty Thankamany
5. Pammakutty Pushparajah
6. Pammakutty Ramanathan
7. Pammakutty Pushparatnam
8. Pammakutty Saroja
9. Pammakutty Thevarajah
10. Pammakutty Thankamalar
11. Pammakutty Kala

Substituted-Plaintiffs-
Appellants

1. Sinnathamby Rasia Alias
Kanthasamy
2. Kunchithamby Rasathy
Both of Ward No. 1,
Chenaikudiruppu

Defendants-
Respondents

Before: C.P. Kirtisinghe - J

Mayadunne Corea - J.

Counsel: H.D.H. Seneviratne appears for the 8th Substituted – Plaintiff Appellant.

R. Mayuri for the Substituted - Defendant - Respondent.

Argued On: 29.11.2022

Decided On: 15.12.2022

C.P. Kirtisinghe - J

Substituted Plaintiffs-Appellants have preferred this appeal from the judgment of the learned District Judge of Kalmunai dated 28.04.1999.

By the aforesaid judgement the learned District judge has dismissed the action of the Plaintiff with costs. He has come to the conclusion that the Plaintiff had failed to prove his title to the corpus while the Defendant has proved his title and the Defendant is in possession. When this matter was taken up for argument the learned counsel for the Substituted Plaintiffs-Appellants as well as the learned counsel for the Defendants-Respondents informed court that they do not wish to make oral submissions and invited court to deliver judgment on the written submissions already filed. We Have considered the written submissions filed in this court and in the District Court. Both parties had filed written submissions in the District Court but only the Defendants-Respondents had filed written submissions in this court. According to the journal entries the Substituted Plaintiffs-Appellants had not filed written submissions before or after the final date granted for the purpose.

The original Plaintiff had died after the institution of this action and the substituted Plaintiffs had filed the amended plaint dated 14th April 1980 praying for a declaration of title to the corpus in this case which is more fully described in the schedule to the plaint, to eject the Defendant and the added Defendant from the corpus and place the substituted Plaintiffs in possession and for damages.

The substituted Plaintiffs had averred in their amended plaint that, one Kali Muttu was the lawful owner of the corpus by virtue of long undisturbed and uninterrupted possession for well over 30 years and the aforesaid kali Muttu transferred the rights to the land on Deed No. 12358 dated 03.03.1972 (marked P1 at the trial) to the original Plaintiff. The Plaintiff and his predecessors in title have been in undisturbed and uninterrupted possession of the land for a period

of well over 30 years by a title adverse to and independent of that of the Defendant and all others and have thereby acquired a prescriptive right to the corpus. The Defendant had entered the land wrongfully and unlawfully and destroyed the boundary fence. Thereafter, the Defendant continues to be in unlawful occupation of the land.

The Defendant in his answer had stated that by virtue of dowry Deed No. 14758 Kali Muttu and her husband Baskaran became owners of a larger land described in the schedule to the answer. Thereafter, by virtue of Deed No. 8945 and Deed No. 160 the Defendant's wife Rasaththy became entitled to the land described in the schedule to the answer. The Defendant had stated that his wife is a necessary party to this action and she had been added as a necessary party. On 11.06.1997 the following issues had been raised by the parties.

The Plaintiffs had raised the following issues,

1. Whether Velupillai Kali Muttu of Chenaikudiyiruppu and his predecessors have been in undisturbed and uninterrupted possession of the property described in the amended plaint?
2. By virtue of Deed of Transfer bearing No. 12358 dated 3-3-1972 attested by K. Chelliah Notary Public whether the said Velupillai Kali Muttu sold the said land and handed over the possession to Vellaiyar Pammakuddy, the deceased Plaintiff?
3. While the Plaintiff and her beneficiaries have been in undisturbed and uninterrupted possession Sinnathamby Rasiah known as Kunchithamby, the deceased Defendant along with his group entered the said land on or about the 7th of March 1972 and disturbed the Plaintiff's possession?
4. If the above issues are answered in positive whether the Plaintiff has sustained any loss? If so how much?
5. If the above issues are answered in positive whether the Plaintiff is entitled for the reliefs sought in the Plaintiff's plaint?

The Defendants had raised the following issues,

6. By and under virtue of Deed bearing No. 14758 dated 15-09-1960 attested by S. Gnanamuthu Notary Public whether Velupillai Kali Muttu and her husband Baskaran who were mentioned in the amended plaint became the owner of the land described in the schedule of the answer?
7. As mentioned in 6th and 7th paragraphs of the answer whether the added Defendant is the owner of the said land?
8. If 6th and 7th issues are answered 'yes' whether these Plaintiffs can proceed with this case?

The Substituted Plaintiffs had based their title solely on prescription. They have not taken up the position that their predecessor in title Kali Muttu was a co-owner of the property who owned a ½ share. They had averred that Kali Muttu became the lawful owner of the property by long undisturbed and uninterrupted possession for well over 30 years. At the trial issue No. 1 had been raised on behalf of the Substituted-Plaintiffs on that basis. According to the Plaintiffs it is that right that Kali Muttu had transferred to the original Plaintiff by Deed No. 12358. The Substituted Plaintiffs had pleaded that the original Plaintiff and his predecessors in title had been in undisturbed and uninterrupted possession of the land for a period of well over 30 years and thereby have acquired a prescriptive right to the land in dispute. That was the case of the Substituted-Plaintiffs.

The action filed by the Substituted-Plaintiffs is a vindicatory action. The Substituted-Plaintiffs are seeking to vindicate their title to the land in dispute and to eject the Defendants from that land. The requisites of a vindicatory action consist of proof,

1. that the plaintiff is the owner of the property in dispute
2. that the property is in possession of the Defendants

The burden of establishing title to the property in dispute devolves on the Plaintiff (**De Silva Vs Gunathilake 32 NLR 217, Abeykoon Hamine Vs Appuhamy 52 NLR 49**)

In **De Silva Vs Gunathilake** Macdonald CJ. observed thus, “There is abundant authority that a party claiming a declaration of title must have title himself. The authorities unite in holding that the Plaintiff must show title to the corpus in dispute and that, if he cannot, the action will not lie”. In **Abeykoon Hamine Vs Appuhamy** Dias SPJ. Stated, “This being an action *Rei Vindicatio*, and the Defendant being in possession, the initial burden of proof was on the Plaintiff to prove that he had dominium to the land in dispute”.

There is no dispute that Kali Muttu’s father Velupillai was the original owner of the larger land of which the corpus in this case was a portion. Velupillai had gifted this larger land to Kali Muttu and her husband Baskaran by the dowry Deed No. 14758 marked D1. Thus, Kali Muttu became a co-owner of the larger land. D1 was executed in 1960. According to the evidence of Kali Muttu, Baskaran had left the matrimonial home somewhere in 1963 or 1964. Until then Kali Muttu who was a co-owner of the larger land could not have commenced adverse possession against the other co-owner Baskaran who was Kali Muttu’s own husband while they were living together in their matrimonial home. The Deed No. 12358 marked P1 had been executed on 03.03.1972. Therefore, assuming that Baskaran left the matrimonial home in the year 1963 the time period between that incident and the execution of P1 is only 9 years. Therefore, even assuming that the possession of Kali Muttu became adverse by some act of ouster after Baskaran left. Kali Muttu could not have prescribed to the property. The learned District Judge had come to a correct finding regarding that matter.

As the learned District Judge has correctly observed the Defendant had purchased an undivided $\frac{1}{2}$ share of the larger land and therefore she has undivided rights in the corpus in dispute which is a portion of the larger land. Therefore, the Defendant is a co-owner of the corpus and she has a right to possess it.

The Substituted Plaintiffs-Appellants in their petition of appeal had stated that the learned District Judge erred in law in not addressing his mind to the question of trust raised in the case. The question of a trust was never raised at the trial.

The Plaintiffs-Appellants, in their written submissions in the District Court had stated that the document marked D3 was not proved. That is the deed on which Baskaran had transferred his undivided rights to the 2nd Defendant. The document D3 had been marked at the trial without subject to proof. Therefore, there is no necessity to call witnesses to prove it. The attorney-at-law for the Substituted Plaintiffs-Appellants had also submitted in the same written submissions that the deed marked D3 had been executed to transfer an undivided ½ share of the entire land (larger land) and there is no specific reference to lot 3. Lot 3 is a portion of the larger land. Therefore, the 2nd Defendant who is a co-owner of the larger land becomes a co-owner of lot 3 as well and for the same reason has a right to possess that lot and cannot be ejected. The attorney-at-law for the Substituted Plaintiffs-Appellants had submitted that because of the conditions contained in D3 the 2nd Defendant cannot enter into lot 3. D3 is a conditional transfer. According to the condition in the deed the transferrer has a right to repay the consideration within a period of 3 years and get the property retransferred. But until then the 2nd Defendant continuous to be the co-owner of the larger land and he has a right to possess the land.

For the aforesaid reasons we see no merit in this appeal. We are of the view that the learned District Judge has come to a correct finding in this case and we see no reason to interfere with that finding. Therefore, we affirm the judgement of the learned District Judge dated 28.04.1999 and dismiss this appeal with costs fixed at Rs. 21,000.

Judge of Court of Appeal

I Agree

Mayadunne Corea - J.

Judge of Court of Appeal