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

Court of Appeal No;
CA/577/2000 (F)
DC Homagama Case No:
3176 /Partition
261

(Deceased) 1. Gunamuni Pabilis Silva,
No. 219, Kiriwaththuduwa.

1A. Gunamuni Wilbert Silva,
No. 219. Kiriwaththuduwa.

2. Amaratunge Achchi Colomboge
Sugathadasa,
Galkanda Road,
Kiriwaththuduwa.

3. Amaratunge Achchi Colomboge
Wiliyon,
Kiriwaththuduwa.

4. Pulukkutti Ralalage
Dharmadasa Perera,
Kiriwathuduwa.

Plaintiffs

-Vs-

(Deceased) 1. Walipitiya Maharalalage
Bolonis Rodrigo,
Galkanda Road,
Kiriwaththuduwa.

IA Walipitiya Maharalalage
Bernard Nandasena
Galkanda Road,
Kiriwaththuduwa.

(Deceased) 2. Withanage Georgie Nona,
Galkanda Road,
Kiriwaththuduwa.

3. Walipitiya Maharalalage
Podihamy alies Emalishamy,
Galkanda Road, Kiriwathuduwa.

4. Walipitiya Maharalalage Gunasena.

5. Walipitiya Maharalalage Nomis,
Makandana, Kesbewa.

(Deceased) 6. Disapathi Lekamlage Yahonis Perera,
Katuwana Road, Homagama.

6A. Disapathi Lekamlage Piyadasa
Perera,
No. 8, Nawa Niwasa,
Vimana Road, Homagama.

7. Illeperuma Arachichige Diyonis,
Thalgahawatta, Gonapola.

8. W.M. Roslin Nona,
Galkanda Road,
Kiriwaththuduwa.

9. W.M. Premawathie Rodrigo,
Galkanda Road, Kiriwaththuduwa.

10. Withanage Georgie Nona,
Galkanda Road, Kiriwaththuduwa.

11. Walipitiya Maharalalage
Bernard Nandasena,
Galkanda Road, Kiriwaththuduwa.

12. Ranaweera Chandrasiri,
Galkanda Road, Kiriwaththuduwa.

13. W.M. Upali Dayasiri,
Galkanda Road, Kiriwaththuduwa.

14. W.M. Ranjith Leelanatha,
Galkanda Road, Kiriwaththuduwa.

15. W.M. Wmitha Rodrigo,
Galkanda Road, Kiriwaththuduwa.

16. W.M. Malini Rodrigo,
Galkanda Road, Kiriwaththuduwa.

17. W.M. Malini Padmaseeli Rodrigo,
Galkanda Road, Kiriwaththuduwa.

18. W.M. Ananda Indrakeerthi,
Galkanda Road, Kiriwaththuduwa.

Defendants

AND NOW

IN THE MATTER OF A PETITION OF APPEAL UNDER SECTION 754(1) OF THE CIVIL PROCEDURE CODE READ TOGETHER WITH SECTION 755 (3) AND 758 THEREOF.

IA. Walipitiya Maharalalage
Bernard Nandasena,
Galkanda Road, Kiriwaththuduwa.

6A. Disapathi Lekamlage
Piyadasa Perera,
No. 8, Nawa Niwasa,
Vimana Road, Homagama.

1A and 6A Defendants
-Appellants

-Vs-

1A. Gunamuni Wilbert Silva,
No. 219. Kiriwaththuduwa.

2. Amaratunge Achchi Colomboge
Sugathadasa
Galkanda Road,
Kiriwaththuduwa.

3. Amaratunge Achchi Colomboge
Wiliyon,
Galkanda Road,
Kiriwaththuduwa.

4. Pulukkutti Ralalage
Dharmadasa Perera,
Galkanda Road, Kiriwathuduwa.

Plaintiffs-Respondents

3. Walipitiya Maharalalage
Podihamy alies Emalishamy,
Galkanda Road, Kiriwaththuduwa.

4. Walipitiya Maharalalage Gunasena.
Makandana, Kesbewa.

5. Walipitiya Maharalalage Nomis,
Makandana, Kesbewa.

7. Illeperuma Arachichige Diyonis,
Thalgahawatta, Gonapola.

8. W.M. Roslin Nona,
Galkanda Road, Kiriwaththuduwa.

9. W.M. Premawathie Rodrigo,
Galkanda Road, Kiriwaththuduwa.

10. Withanage Georgie Nona,
Galkanda Road, Kiriwaththuduwa.

11. Walipitiya Maharalalage
Bernard Nandasena,
Galkanda Road, Kiriwaththuduwa.

12. Ranaweera Chandrasiri,
Galkanda Road, Kiriwaththuduwa.

13. Upali Dayasiri,
Galkanda Road, Kiriwaththuduwa.

14. Ranjith Leelanatha,
Galkanda Road, Kiriwaththuduwa.

15. Amitha Rodrigo,
Galkanda Road, Kiriwaththuduwa.

16. Malini Rodrigo,
Galkanda Road, Kiriwaththuduwa.

17. Malini Padmaseeli Rodrigo,
Galkanda Road, Kiriwaththuduwa.

18. Ananda Indrakeerthi,
Galkanda Road, Kiriwaththuduwa.

Defendants-Respondents

Before: C.P. Kirtisinghe - J.
R. Gurusinghe - J.

Counsel: Rajindh Perera with Zahea Hassim for the 1B and 6B Defendants-Appellants.

Ranjan Suwandarathne, PC with Amila Rajakaruna for Plaintiff-Respondent.

Canishka Witharana with Sawani Rajakaruna on the instructions of Medha Gamage for the 14C Substituted-Defendant-Respondent.

Argued on: 09.06.2023

Decided On: 17.10.2023

C. P. Kirtisinghe - J.

1A and 6A Defendants-Appellants have preferred this appeal from the judgement of the learned District Judge of Homagama dated 02.04.1987. By the aforesaid judgement the learned District Judge had decided the pedigree dispute in this case in favour of the Plaintiffs. He has also rejected the prescriptive claim of the 1st, 2nd, 3rd, 6th and 8th Defendants.

When this matter was taken up for argument all the parties agreed to dispose the case by written submissions and we have perused the written submissions tendered by the parties.

The case record of the District Court had been reconstructed after the original case record was destroyed by fire. When this matter was taken up for argument none of the parties took up the position that the reconstructed case record is not in order or incomplete.

The learned Presidents' Counsel for the Plaintiffs-Respondents has taken up two preliminary objections as to the maintainability of this appeal. He has submitted that the notice of appeal and the petition of appeal tendered by the Appellants are clearly out of time. The judgement in this case had been delivered by the

learned District Judge of Homagama on 02.04.1987. The notice of appeal dated 10.09.2000 had been filed at the registry on 12.09.2000. The petition of appeal dated 27.10.2000 had been filed at the registry on the same date.

Section 754(1) of the Civil Procedure Code provides that any person who shall be dissatisfied with any judgement pronounced by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgement for any error in fact or in law. Section 754(4) provides that the notice of appeal shall be presented to the court of first instance for this purpose by the party appellant or his registered attorney within a period of fourteen days from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays, and the court which the notice is so presented shall receive it and deal with it as hereinafter provided. If such conditions are not fulfilled, the court shall refuse to receive it.

Section 755(3) provides that, every appellant shall within sixty days from the date of the judgement or decree appealed against, present to the original court, a petition of appeal setting out the circumstances out of which the appeal arises and the grounds of objection to the judgement or decree appealed against, and containing the particulars required by section 758, which shall be signed by the appellant or his registered attorney. Such petition of appeal shall be exempt from stamp duty:

Provided that, if such petition is not presented to the original court within sixty days from the date of the judgement or decree appealed against, the court shall refuse to receive the appeal.

Therefore, it is crystal clear that the notice of appeal and the petition of appeal filed by the Appellants are clearly out of time.

In the cases of **Charlette Nona Vs. Babun Singho 2000 (3) SLR 149, Selenchina Vs. Mohammed Marikkar and others 2003 SLR 100, Sri Lanka State Trading (Consolidated Exports) Corporation Vs. Dharmadasa 1987 (2) SLR 235** and **Mohideen Natchia Vs. Ismail Marikkar - (D.B.) S.C. minutes of 11.10.1982** it was held that a notice of appeal shall be presented to the court of first instance within a period of fourteen days from the date of the judgement and that period should be calculated in the manner provided by the section.

In the case of **Wickramasinghe Vs. De Silva 1978/79 (2) SLR 65** it was held that the provisions of section 755(3) of the Civil Procedure Code which requires the

petition of appeal to be filed within sixty days from the date of the judgement are mandatory and where a petition had been filed after that period had lapsed, the learned District Judge was correct in rejecting such a petition of appeal. In the case of **Municipal Council of Colombo Vs. Piyasena 1980 (2) SLR 39** it was held that in the computation of the period of sixty days from the date of judgement set out in section 755 (3) of the Civil Procedure Code for filling a petition of appeal, Sundays and public holidays are not excluded and accordingly a petition filed sixty - five days after the delivery of judgement is out of time.

When the aforementioned tests and guidelines are applied the notice of appeal and the petition of appeal filed by the Appellants are clearly out of time and have to be rejected *in limine*.

However, when one takes into consideration the background of this case there is no dispute between the parties that the buildings of the District Court of Homagama were destroyed by fire and the original case record of this case was also destroyed by fire. Thereafter, the Plaintiffs had reconstructed the case record. The 6th Defendant had informed the District Court that he had tendered a notice of appeal and a petition of appeal against the judgement of this case. He had tendered to the District Court photocopies of the notice of appeal and the petition of appeal filed by him. However, the Appellants had tendered to court another notice of appeal dated 10.09.2000 and another petition of appeal dated 27.10.2000 which are to be treated as the notice of appeal and the petition of appeal in this case. Those two documents are out of time. In such a situation the proper course opened to the Appellants was to invoke the provisions of section 765 of the Civil Procedure Code and to file an appeal notwithstanding lapse of time.

Section 765 reads as follows;

765. It shall be competent to the Court of Appeal to admit and entertain a petition of appeal from a decree of any original Court, although the provisions of sections 754 and 755 have not been observed:

“Provided that the Court of Appeal is satisfied that the Petitioner was prevented by causes not within his control from complying with those provisions; and

Provided also that it appears to the Court of Appeal that the Petitioner has a good ground of appeal, ……..”

The learned Counsel for the Appellants in his written submissions had drawn our attention to an order made by the learned District Judge on 16.05.2000 which reads as follows;

“මෙම නඩුවේ 87.04.02 වන දින තීන්දුව ප්‍රකාශ කර ඇති හෙයින්, දැන් කල යුතුව තිබෙන්නේ එකී තීන්දුවට අනුකූල වන පරිදි මෙම නඩුවේ අතුරු තීන්දු ප්‍රකාශයක් ඇතුලත් කිරීමයි. අතුරු තීන්දු ප්‍රකාශය ඇතුලත් කල වහාම ඉහත කී 754 සහ 755 වගන්ති වලට අනුව එයට එරෙහිව අභියාචනයක් ගරු අභියාචනා අධිකරණයට ඉදිරිපත් කිරීමට කිසිම බාධාවක් විත්තිකාර පෙත්සම්කරුවන්ට නැත.”

It is the submission of the learned Counsel that the learned District Judge had permitted the Appellants to lodge an appeal in accordance with the provisions of sections 754 and 755 of the Civil Procedure Code after entry of the interlocutory order. That order is *per in curium* as the learned District Judge had not taken into consideration the imperative provisions of section 754 and 755 of the Civil Procedure Code.

However, the Appellants had not thought it fit to make use of the provisions of section 765 and they had failed to tender an appeal notwithstanding lapse of time. Therefore, this court has no option but to reject the notice of appeal and the petition of appeal which are clearly out of time. But this court can take into consideration whether the court should exercise its extraordinary revisionary jurisdiction to grant relief to the Appellants although there is no invitation from the Appellants to do so. Exceptional circumstances have arisen in this case as a result of the destruction of the case record by fire. Therefore, if the Appellants have a good ground of appeal and if there is merit in their appeal this court can always act in revision and grant them relief although they cannot demand it as a right. Having kept those guidelines in mind I will now proceed to consider whether there is merit in this appeal.

When one peruses the petition of appeal filed by the 1A and 6A Defendants Appellants the Appellants are seeking to set aside the judgement of the learned District judge mainly on the following three grounds.

1. The Plaintiffs had failed to establish the identity of the corpus.
2. The Plaintiffs had failed to prove a portion of their pedigree and thereby resulting in the contesting Defendants losing a sizable proportion of shares to which they are entitled by right of inheritance.
3. The learned District Judge has omitted to consider the overwhelming evidence of prescriptive possession by the contesting Defendants.

The identification of the corpus

Proper identification of the corpus is of paramount importance in a partition action. As observed by Saleem Marsoof J. in **Sopinona Vs Pitipanaarachchi (2010) 1 SLR 87,** without proper identification of the corpus it would be impossible to conduct a proper investigation of title because clarity in regard to identity of the corpus is fundamental to the investigation of title in a partition case. According to the description of the corpus in this case as given in the schedule to the plaint the extent of the land is approximately 6 acres. In the preliminary plan marked X, the extent of the land surveyed as the corpus in this case is 4 acres 2 roods and 25 perches. Approximately there is a difference of a little more than 1 acre in extent between the land shown in the preliminary plan and the land described in the schedule to the plaint. The learned Counsel for the 1A and 6A Defendants-Appellants in his written submissions has drawn our attention to that fact. When one takes in to consideration the extent of the land as mentioned in the schedule to the plaint relatively to the extent of the land surveyed and the fact that the extent mentioned in some of the deeds and in the schedule, itself are not the exact extent but only a rough calculation, such a deference in extent is excusable. As the learned District judge had correctly observed the extent mentioned in the deeds applicable to the corpus is only a rough calculation and there is no reference to any title plan. The learned District judge had further observed that when a deed is executed it is the practice of the notaries to get particulars of the boundaries from the earlier deeds. The fact that there is no reference to a plan in the schedule of the deeds executed in respect of the corpus in this case and the fact that the extent mentioned in the deeds is a rough calculation (පමණ) show that the corpus had not been surveyed earlier and there is no title plan to the corpus. Therefore, the extent of the land surveyed can be less than 6 acres or more than 6 acres as referred to in the schedule to the plaint and the title deeds of the corpus. The discrepancy between the extent of the land surveyed and the extent referred to in the schedule to the plaint and the deeds applicable to the corpus can be explained in that manner and in comparison, to the extent of the corpus as referred to in the plaint and in the deeds the extent of the land surveyed is not incompatible. When one examines the existing boundaries of the land surveyed as shown in the preliminary plan marked X there are physical demarcations of the boundaries visible right around the corpus and the land surveyed appears as a single unit which is separated from the surrounding lands by physical demarcations of boundaries. As the learned District Judge had correctly

observed the 1st to 6th Defendants were present at the preliminary survey and according to the survey report marked X1, none of the parties had informed the commissioner that the land surveyed is a portion of a larger land and a part of it remains outside the boundaries surveyed. The surveyor had reported that the boundaries were pointed out by the parties present. None of the Defendants in their statements of claim had taken up the position that the land surveyed is a portion of a larger land. At the commencement of the trial on 23.04.1985, none of the Defendants had raised any issue disputing the identity of the corpus. However, while the trial was proceeding issues No. 11 and 12 had been raised on behalf of 6th and 8th Defendants disputing the identity of the corpus. The question whether the extent of the land surveyed is lessor than the extent mentioned in the plaint is a question of law which goes to the root of a partition action and the contesting Defendants were entitled to raise those issues even at that stage but the fact that they had not informed that to the Commissioner at the preliminary survey and the fact that they did not take up that position in the statement of objections affect the *bona fides* of their contention. For the aforementioned reasons on the balance of probability of evidence the learned District judge could have come to the conclusion that the land shown in the preliminary plan is the corpus in this case and we are of the view that the learned District judge had arrived at a correct conclusion regarding the identity of the corpus.

Pedigree Dispute

The 6th and 8th Defendants had disputed a portion of the pedigree disclosed by the Plaintiffs. Out of those two only the 6A Defendant had appealed against the findings of the learned District Judge. The 8th Defendant is not challenging the findings of the learned District Judge. According to the pedigree disclosed by the Plaintiffs the original owner Dochchohamy had three children namely Elisahamy, Babahamy and Manikhamy. Manikhamy had three children namely Yohanis, Daniel, Dharmadasa. Therefore, 1/3rd of Dochchohamy's rights had devolved on her daughter Manikhamy's children and thus Dharmadasa alias Dharmasena became entitled to a 1/9th share. According to the Plaintiffs' pedigree and the evidence of the 1st Plaintiff, Dharmadasa alias Dharmasena had transferred his rights to the 1st Plaintiff on deed No. 3275 marked ඇ12. The 6th and 8th Defendants had disputed that portion of the pedigree and raised the 3rd and 4th issues at the trial disputing that part of devolution. Those two issues read as follows;

03. මැණික්හාමිට ධර්මසේන යන නමින් පුතෙකු සිටියාද?

04. එවැනි පුතෙකු මැණික්හාමිට නොසිටියේ නම් පැමිණිල්ලේ සඳහන් අංක 3275 දරන ඔප්පුවෙන් 1 වෙනි පැමිණිලිකරුට කිසියම් අයිතියක් ලැබුනේද?

It has been suggested to the 1st Plaintiff in cross examination that Daniel did not have a brother in the name of Dharmasena and the 1st Plaintiff had denied that suggestion. He had admitted that in the earlier testamentary case Daniel's brother's name was cited as Dharmadasa. The 1st Plaintiff had stated in his evidence that Manikhamy had three children and Dharmasena was one of them. Dharmasena had transferred his rights to the 1st Plaintiff on the deed marked පැ12. Although the contesting Defendants did not give evidence in court to contradict this position and to say that Manikhamy did not have a child in the name of Dharmasena, they had cross examined the 1st Plaintiff on that basis. However, the evidence of the 1st Plaintiff to that effect had not shaken in cross examination and that evidence is corroborated by independent evidence. In the deed marked පැ12 the vendor Dharmasena Perera had referred to his maternal inheritance from Manikhamy and he signed the deed as D. L. Dharmasena. In the deed marked පැ13 on which deed Manikhamy's three children Yahonis Perera, Daniel Perera and Dharmasena had sold their rights in some other land to one Jamis, it is stated that Manikhamy is the mother of the three vendors and they have got their rights from Mnikhamy's maternal inheritance. The transferee of that deed Jamis testified at the trial and stated that the three vendors of the deed were Manikhamy's children and he purchased rights from them and he knew Dharmasena. Gunamuni Liveris Silva, the son-in-law of Boloris Rodrigo who had purchased rights from Babahamy, one of the children of the original owner, in his evidence stated that Manikhamy had three children namely, Yahonis, Daniel and Dharmasena. Dharmasena signed the deed marked පැ12 at the hospital and the notary who attested the deed read and explained the deed to Dharmasena before he signed in the presence of the witness Liveris Silva and Liveris Silva signed the deed as one of the witnesses. The learned Counsel for the Defendants-Appellants had submitted in his written submissions that Yohanis has not stated that his brother's name is Dharmasena or that his brother Dharmadasa was also known as Dharmasena. But Yohanis did not testify at the trial. There is no evidence whether he was living at that time. However, on a balance of probability of evidence one can come to the conclusion that the vendor of the deed marked පැ12, Dharmasena is one of the children of Manikhamy and the learned District judge has come to a correct finding in respect of that matter. The 8th Defendant who was challenging that portion of

the devolution along with the 6th Defendant had not appealed against that finding and the 6A Defendant had not challenged the balance portion of the Plaintiffs' pedigree.

The Prescriptive Rights of the 1st, 2nd ,3rd ,6th and 8th Defendants

At the commencement of the trial issue No. 07 had been raised on behalf of the 6th and 8th Defendants on the basis that the 6th and 8th Defendants had prescribed to the entire corpus by long and continued exclusive possession. Thereafter, that issue had been modified and reframed on the basis that the 6th and 8th Defendants along with the 1st,2nd and 3rd Defendants had prescribed to the entire land. The reframed issue No. 07 reads as follows;

(7) 6 වෙනි සහ 8 වෙනි විත්තිකරුවන් 2 වෙනි 3 වෙනි හා 1 වෙනි විත්තිකරුගේ උරුමක්කාරයින් සමඟ සම්පූර්ණ ඉඩමට කාලාවරෝධි අයිතිවාසිකම් ලබා තිබේද?

By answering that issue in the negative the learned District Judge has come to the conclusion that the contesting Defendants had failed to prove that they had prescribed to the entire corpus and that finding can be justified for the following several reasons.

1) The 6th Defendant in his last amended statement of claim dated 01.02.1980 had stated that the 1st, 2nd, 3rd and 6th Defendants are entitled to the following undivided rights by prescription.

1 වෙනි විත්තිකරුගේ උරුමක්කාරයින්ට නොබෙදූ අක්කර 1ක් සහ 1/3 එකක් අත්හැර ඉතිරි කොටස

2 වෙනි විත්තිකාරියට නොබෙදූ අක්කර 1/2ක්

3 වෙනි විත්තිකාරියගේ උරුමක්කාරයින් නොබෙදූ අක්කර 1/2ක්

6 වෙනි විත්තිකරුට මෙම ඉඩමෙන් නොබෙදූ 1/3 න් කොටසක්

Therefore, it is the case of the 6th Defendant that the heirs of the 1st and 3rd Defendants along with the 2nd and 6th Defendants had acquired prescriptive title to the aforementioned undivided rights as against the other co-owners of the corpus. That is a concept which is unknown to the law relating to prescription. Under the provisions of the section 3 of the Prescription Ordinance one can prescribe to a land. You can only prescribe to a land or a portion of a land. There is no provision in the Prescription Ordinance which enables a party or a co-owner to prescribe to an undivided share of a right as against the other co-owners.

Therefore, the prescriptive claim of the contesting Defendants is misconceived in law and has to be rejected on that ground alone.

2) As the learned District Judge has observed the 6th Defendant in his statement of claim dated 19.05.1976 had stated that Manis referred to in the plaint had died leaving his Widow Sisiliyana and the two children Sugathadasa and Karunawathi as his heirs. Therefore, the 6th Defendant had conceded the fact that Sisiliyana, Sugathadasa and Karunawathi had undivided rights in the corpus. According to the Plaintiffs' pedigree the 2nd Plaintiff Sugathadasa is one of the two children of Manis and he had purchased the rights of his sister Karunawathi. Therefore, the 6th Defendant had conceded the fact that the 2nd Plaintiff is a co-owner of the corpus by paternal inheritance and accepted the undivided rights of the 2nd Plaintiff. Therefore, the 6th Defendant cannot have adverse possession against the 2nd Plaintiff and prescribe to the entire corpus.

3) As the learned District Judge has observed Bolonis Rodrigo the 1st Defendant and Georginona the 2nd Defendant had stated in their answer filed in the District Court of Panadura in an earlier case (marked P15) that Dochchohamy was the original owner of this land – Galkandewatta in extent of 6 acres and his rights devolved on his three children, Elisahamy, Babahamy and Manikhamy. They had stated that Elisahamy's rights devolved on the two children Elias and Manis who became entitled to a 1/6th share and Manis's rights devolved on his two children. In that answer the 1st and 2nd Defendants had conceded to the devolution of the undivided rights of Elisahamy, Babahamy and Manikhamy. Therefore, the 1st and 2nd Defendants cannot ask for a prescriptive right to the entire corpus as against the heirs of the original owner's three children and those who are claiming under those three children.

4) The 1st Plaintiff in cross-examination had stated that he possessed a portion of the corpus. He plucked coconut and mangos and took the produce. It had been suggested to the 1st Plaintiff in cross-examination that he did not possess the corpus, a suggestion which the 1st Plaintiff had denied. The 1st Plaintiff had admitted that the earlier action in the District Court of Panadura had been instituted in respect of a portion of this same land and he had admitted that he did not intervene in that case. It had been suggested to the 1st Plaintiff that he did not intervene in that case and did

not do anything in relation to that case because the 1st Plaintiff did not have possession in the land. The 1st Plaintiff had denied that suggestion. In reply the 1st Plaintiff had stated that the action instituted earlier was a damages case and no one intervened without summons. It is an acceptable explanation. When one peruses the plaint in the earlier case marked ඒ7 14 it is apparent that it was not a partition case but an action for a declaration of title, ejectment and damages which is an action *in personam* instituted against the 1st and 2nd Defendants of this case. Therefore, it is not necessary for the Plaintiffs in this case to intervene in that action and because of the failure of the 1st Plaintiff to intervene in that case one cannot come to the conclusion that he did not possess the corpus. 1st Plaintiff's evidence to the effect that he plucked coconuts and mangos and thereby possessed a portion of the corpus had not shaken in cross-examination. The learned Counsel for the 1A and 6A Defendants-Appellants has submitted that the actual physical possession of the contesting Defendants and taking of produce had not been challenged. But none of the Defendants came forward to give evidence to say that they were in exclusive possession and the Plaintiffs never possessed the corpus. Therefore, it was open to the learned District Judge to accept the 1st Plaintiff's evidence regarding possession.

5) In the surveyor report marked X1 the commissioner has reported that the 1st and the 3rd Defendants who are living in the corpus had claimed to the plantations around their houses but the rest of the plantation were claimed in common by the parties. 1st and the 3rd Defendants are claiming for the entire land on prescription along with the 2nd, 6th and 8th Defendants. If they had prescribed to the entire land the 1st and the 3rd Defendants should have claimed for the entire plantation, which they had failed to do. Other parties had claimed to the remaining plantation and the 1st and the 3rd Defendants had not preferred a counter-claim for the remaining plantation. That shows that the contesting defendants had not possessed that plantation, they were not in exclusive possession and other parties had possessed a portion of the plantation.

6) The 1st, 2nd, 3rd and 6th Defendants are co-owners of the corpus. Even assuming (but not conceding) that they had been in exclusive possession

of the corpus for a long period of time that itself will not entitle them to establish a prescriptive right to the entire corpus.

A co-owner's possession is in law the possession of his other co-owners. It was held in the landmark judgement of **Corea Vs Appuhamy 15 NLR 65** that the possession by a co-owner enures to the benefit of his other 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. This doctrine has been consistently applied in a series of judgements of the Supreme Court – for instance in **William Singho Vs Ran Naide (1915) 1 CWR 92, Mailvaganam Vs Kandaiya (1915) 1 CWR 175, A.S.P. Vs Cassim (1914) 2 Bal notes 40, Zamara Vs Duraya (1913) 2 Bal notes 70.**

In this case there is no evidence of any act of ouster by the contesting Defendants which demonstrates that they got rid of the character of a co-owner and their possession had become adverse to the other co-owners.

Section 3 of the Prescription Ordinance No. 22 of 1871 as amended by Ordinance No.2 of 1889 declares that, "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 of 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…"

The concept of undisturbed possession was commented on in the case of **Simon Appu Vs Christian Appu (1895) 1 NLR 288.** In that case Withers J. had observed as follows;

"Possession is disturbed either by an action intended to remove the possessor from the land or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous into a disconnected and **divided user**."

In that case Lowrie ACJ. Said;

"A disturbance is something less than an interruption; it is a disturbance if, for a time, **someone succeeds in getting partial possession**, **not to the entire exclusion of the former possessor, but jointly with him**."

The burden of proving prescription is on the contesting Defendants. To succeed in their prescriptive claim the contesting Defendants must prove on a balance of probability of evidence that prior to the institution of this partition action they had been in uninterrupted and undisturbed possession of the corpus for a period exceeding 10 years independently or adverse to the rights of other co-owners. None of the contesting Defendants thought it fit to come forward and give evidence in court to establish their prescriptive claim. They had failed to prove that they had exclusive possession of the corpus. They had failed to prove that an act of ouster had occurred. There is no evidence regarding the period of possession of the contesting Defendants. Therefore, on a balance of probability of evidence on can come to the conclusion that the contesting Defendants had failed to prove that they have prescribed to the entire corpus.

For the aforementioned reasons we see no merit in this appeal. The learned District Judge has come to a correct finding regarding the identification of the corpus, the pedigree dispute and the prescriptive claim of the contesting Defendants and we see no reason to interfere with those findings. Therefore, there is no reason for us to act in revision and set aside the judgement of the learned District Judge. Therefore, we reject the petition of appeal and the notice of appeal filed in this case.

Judge of Court of Appeal

R. Gurusinghe - J.

I Agree

Judge of Court of Appeal