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

C.A. Case No.1191/2000 (F)

D.C. Galle Case No.P/11223

Karunadasa Nanayakkarawasan Wakwella Gamage

No.28, Dharmapala Mawatha,

Madiwela, Kotte.

PLAINTIFF

-Vs-

1. Kaluarachchige Ariyadasa
   No.191/3, Koswatte, Talangama.
2. Eswara Kankanamge Violet
   of Porawakarawatte, Wakwella.
3. Eswara Kankanamge Regina
   of Porawakarawatte, Wakwella.
4. Gammanage Asoka Anurasiri Dharmaratne
   of Porawakarawatte, Wakwella.
5. Niyagamage Lissinona
   of Porawakarawatte, Wakwella.
6. Niyagamage Alicenona
   of Molligoda, Ukawatte, Gintota.
7. Niyagamage Karunapala (Deceased)
   of Godagedara, Ukwatte, Gintota.

5A. M. Somawathie
   of Godagedara, Ukwatte, Gintota.

8. Niyagamage Gunawathie
   of Porawakarawatte, Wakwella.

9. Niyagamage Paulis
of Peralandawatte, Gonamulle,
Dewalapola.
DEFENDANTS

AND

5. Niyagamage Lissinona
of Porawakarawatte, Wakwella.

5A. Niyagamage Alicenona
of Molligoda, Ukawatte, Gintota.

5B. M. Somawathie
of Godagedara, Ukwatte, Gintota.

5C. Niyagamge Indrani Jayalatha
No.273/3, Kolonnawa Road,
Wellampitiya.

5D. Niyagamage Gunawathie
No.115, Porawakarawatte,
Wakwella.

6. Niyagamage Alicenona
of Molligoda, Ukawatte, Gintota.

7A. M. Somawathie
of Godagedara, Ukwatte, Gintota.

8. Niyagamage Gunawathie
of Porawakarawatte, Wakwella.

9. Niyagamage Paulis
of Peralandawatte, Gonamulle,
Dewalapola.

10. Niyagamge Indrani Jayalatha
No.273/3, Kolonnawa Road,
Wellampitiya.
5th to 9th DEFENDANT-APPELLANTS

-Vs-

Karunadasa Nanayakkarawasan Wakwella Gamage
No.28, Dharmapala Mawatha,
Madiwela, Kotte.
PLAINTIFF-RESPONDENT

1. Kaluarachchige Ariyadasa
No.191/3, Koswatte,
Talangama.
4. Gammanage Asoka Anurasiri Dahrmaratne
of Porawakarawatte, Wakwella
1st and 4th DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Amrit Rajapakse for the 5th to 9th Defendant-Appellants

Hemasiri Withanachchi for the 1st to 4th Defendant-Respondents

Written Submissions on: 20.03.2017 (1st to 4th Defendant-Respondents)
03.07.2017 (5th to 9th Defendant-Appellants)

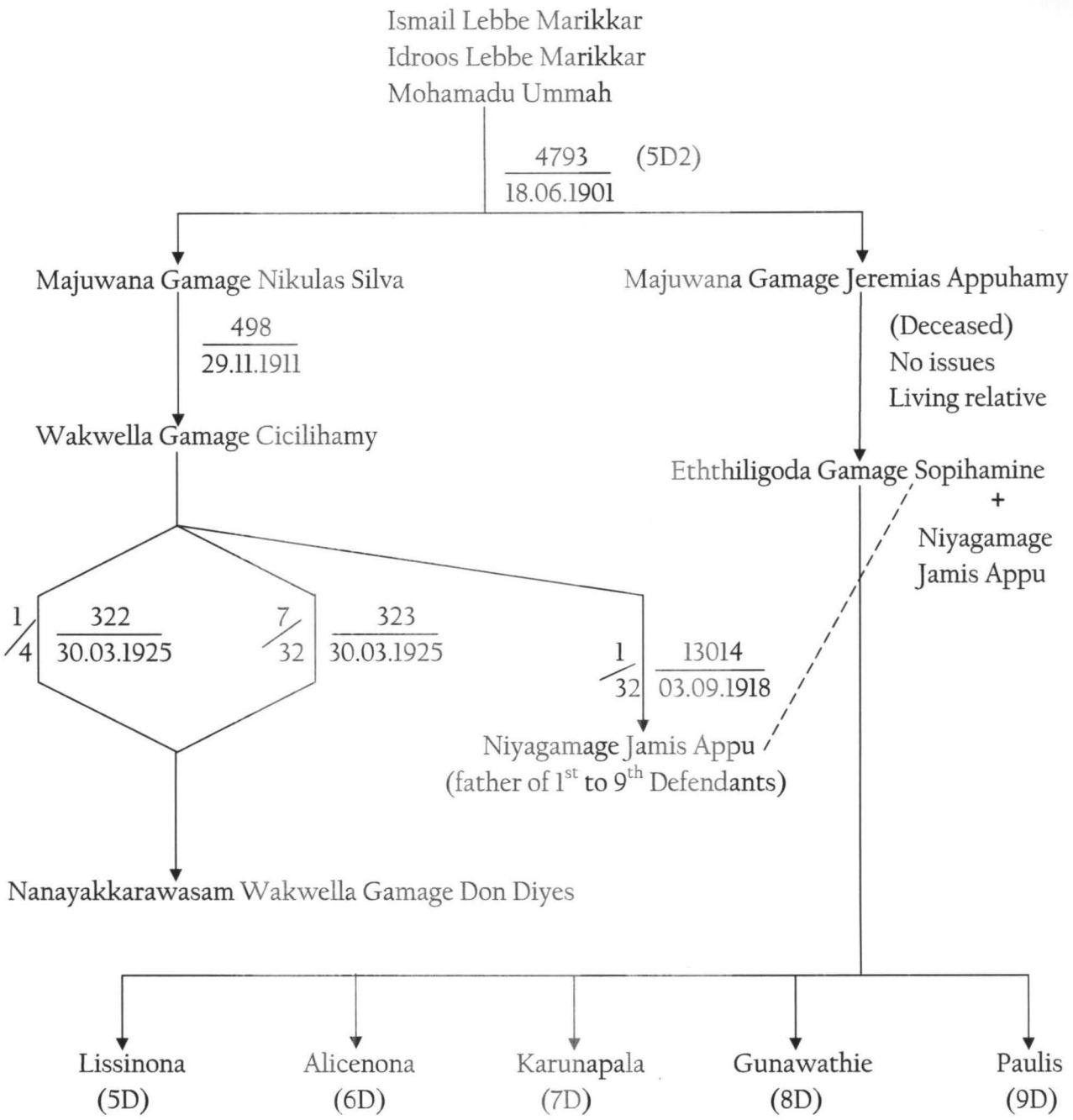
Decided on : 21.09.2018

A.H.M.D. Nawaz, J.

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted this action to partition a land called *Kahatagahawatte alias Porawakaragewatte* described as lot A in the preliminary plan bearing No.2976. The surveyed extent of lot A is described as 3 roods and 34.3 perches. There was no contest about the identity of the corpus and in fact it was recorded as an admission at the trial. The 1st to 4th Defendant-Respondents (hereinafter sometimes referred to as "the 1st to 4th Defendants") filed a statement of claim essentially agreeing with the Plaintiff and the 1st to 4th Defendants stood in the relationship of nephews and nieces to the Plaintiff.

The 5th to 9th Defendant-Appellants (hereinafter sometimes referred to as "the 5th to 9th Defendants") filed their statement of claim and disclosed a pedigree which brought out different original owners, who were indeed accepted by the learned Additional District Judge of *Galle* to be the original owners in the case. As such I would begin from these three original owners whose land finally ended up as the subject-matter of this case. Even the 1st to 4th Defendants who initially filed a statement of claim supporting the pedigree of the Plaintiff made a volt-face and filed an amended statement of claim accepting the original owners put forward by the 5th to 9th Defendants-*see* para 3 of the amended statement of claim filed by the 1st to 4th Defendants dated 10.09.1993 at p.58 of the Appeal Brief.

Thus the original owners of the land were *1)*Ismail Lebbe Marikkar *2)*Idroos Lebbe Marikkar and *3)*Mohamadu Ummah. Since the 1st to 4th Defendants have conceded this and the learned Additional District Judge of *Galle* has accepted the devolution flowing from these three original owners, I would reproduce the pedigree filed by the 5th to 9th Defendants, which depicted the devolution.



The three original owners owned the entire land and by a Deed bearing No.4793 and dated 18.06.1901, they sold the entirety of the corpus to two brothers, Majuwana Gamage Nukulas Silva and Majuwana Gamage Jeremias Appuhamy. Nikulas and Jeremias acquired an undivided half share each of the corpus. This disposition was marked as **5D2** (page 98 and 334 of the Appeal Brief). One half of the land was acquired by Nikulas Silva, whilst the other half went to his brother Jeremias Appuhamy. As the pedigree at page 54 of the

Appeal Brief, which I have reproduce above, shows, Nikulas Silva sold his share to Wakwella Gamage Cicilihamy by a Deed bearing No.498. Cicilihamy, by two consecutive deeds executed on the same day, namely 30.03.1925, transferred a portion of her share to Don Diyes-the predecessor in title of the Plaintiff. By a Deed bearing No.322 dated 30.03.1925, Cicilihamy sold an undivided 1/4th share to Don Diyes, whilst she gifted an undivided 7/32 share to Don Diyes. By these two dispositions Don Diyes obtained an undivided 15/32 share of Nikulas Silva's half share. Long before these dispositions of 1925, as far back as 03.09.1918, Cicilihamy had already gifted 1/32 share to Niyagamage Jamis Appu who was the father and predecessor in title of the 5th to 9th Defendants. This is how Cicilihamy transferred the half share of the corpus, which had belonged to Nikulas Silva.

I must point out that the Plaintiff and 1st to 4th Defendants all claim under Don Diyes who had got 15/32 shares under the two Deeds bearing No.322 and 323. Since the balance 1/32 share had already been gifted to Jamis Appuhamy, who is the predecessor in title of the 5th to 9th Defendants, the sum total of the paper title to half share of Nikulas Silva would be as follows:-

> *The paper title to Nikulas Silva's 15/32 share is with the Plaintiff and 1st to 4th Defendants, whilst the paper title to 1/32 share is vested in the 5th to 9th Defendants through their father Jamis Appuhamy.*

I must at this stage interpose and make the observation that there is no contest among the parties as far as the devolution of the half share of Nikulas Silva to the land is concerned.

This single contest that figured prominently in the District Court was about the other half share which had belonged to Jeremias Appuhamy. Neither of the contesting parties could produce any paper title to this half share. Instead what the Plaintiff asserted was that when Jeremias Appuhamy passed away, Nanayakkarawasam Wakwella Gamage Don Diyes (the Plaintiff's predecessor in title) prescribed to the balance half share of the land. In other words the Plaintiff staked a claim to the balance half share of the land on prescription. The 5th to 9th Defendants put forward a different claim to this half share. Their argument went as follows. Jeremias Appuhamy had died unmarried and issueless.

Their mother Eththiligoda Gamage Sopihamine was the only living relative (niece) of Jeremias Appuhamy to whom, the 5th to 9th Defendants argued, their mother succeeded under the law of intestate succession. So in a nutshell whilst the Plaintiff and the 1st to 4th Defendants claimed title to one half share of Jeremias Appuhamy on prescription, the 5th to 9th Defendants made their claim to the half share based on intestate succession. I must say that the 5th to 9th Defendants did not place credible evidence to establish that their mother Sopihamine had succeeded as an intestate heir to the balance half share of Jeremias Appuhamy and this Court would proceed on the basis that the 5th to 9th Defendants had no intestate rights in the balance half share of the corpus. The only question before this Court is then whether the Plaintiff has prescriptive rights to the half share of Jeremias Appuhamy.

These were the main issues that the parties principally proceeded to trial in the District Court of *Galle* and only three witnesses gave evidence at the trial. Whilst the Plaintiff gave evidence at the trial in order to buttress his case, the 4th Defendant testified on behalf of the 1st to 4th Defendants. The 8th Defendant gave evidence on behalf of the 1st to 9th Defendants.

I would digress at this stage to look at the locational habitation of the parties on the land. The report of the surveyor at p 217 sets out the respective claims of parties. One finds a number of houses and buildings standing spread out discretely on the land and according to the surveyor, the buildings marked from 1 to 5 were claimed by the 5th to 8th Defendants, whilst the buildings and structures marked as 6, 7, 8, 9, 10, 11 and 12 were claimed by the Plaintiff and the 1st to 4th Defendants.

One significant aspect of the situational location of the parties is that there were no boundaries confining the parties to defined locations. There emerges evidence of collective enjoyment of the entire land, though there are houses standing at discrete distances. The only boundaries, if at all, are the external boundaries to the land.

The question of specific locations where co-owners reside on a co-owned land is quite relevant when considering whether or not a presumption of ouster should be drawn in the

event long and continued possession is alleged and the fact that no party has enjoyed the land to the exclusion of others is a recognition of the others' interest in the land.

Bearing in mind the pivotal question on which this case was litigated in the District Court of *Galle*, namely whether the Plaintiff established his case of prescription within Section 3 of the Prescription Ordinance, it is apposite to allude to the judgment of the learned Additional District Judge of *Galle* dated 29.09.1999 (at p.201-211 of the Appeal Brief). The learned Additional District Judge deals with the devolution of Nikulas Silva's share from pages 1 to 7 and at page 7 of his judgment he has allotted shares which add to 80/60. This is the correct devolution as far as one half of the corpus is concerned. This deals with Nikulas Silva's share and this computation is unassailable.

Afterwards the learned Additional District Judge proceeds to deal with the prescriptive title claimed by the Plaintiff and the 1st to 4th Defendants. He holds in favour of the Plaintiff and the 1st to 4th Defendants that they have prescribed to the other one half of the corpus namely the half share that had belonged to Jeremias Appuhamy. As I said before, this was the focal issue in the arguments before this Court. Mr. Amrit Rajapakse-the learned Counsel for the 5th to 9th Defendant-Appellants strenuously contended that this was an erroneous decision on the part of the learned Additional District Judge of *Galle*.

In order to prove prescriptive title, the Plaintiff and the 1st to 4th Defendants relied on 4 deeds, namely, **P21**, **P22**, **P23** and **P24**. These are a series of transactions which the Plaintiff's privies indulged in dealing with a greater portion of the corpus than they were really entitled to on paper. From the foregoing it is clear that the Plaintiff is entitled to 15/32 shares of the half share of Nikulas Silva. This is the paper title that the Plaintiff and the 1st to 4th Defendants had. But the prescriptive title they claim is over and above that paper entitlement and that prescriptive title encompasses some portions of the half share of Jeremias Appuhamy. The transactions that the privies of the Plaintiff had entered into would be tabulated as follows:-

Deed No. / Date	Executant(s)	Nature of Deed	Share of corpus dealt with
6312 22.01.1929 **(P21)**	Wakwella Gamage Cicilihamy and Nanayakkarawasan Wakwella Gamage Don Diyes Appuhamy (Lessosrs)	Lease	Entire land (fruits only)
864 11.01.1936 **(P22)**	Nanayakkarawasan Wakwella Gamage Don Diyes Appuhamy (Lessosrs)	Lease	27/32
2298 01.04.1938 **(P23)**	Ethiligoda Gamage Hinnihamy and Nanayakkarawasan Wakwella Gamage Don Diyes Appuhamy (Mortgages)	Mortgage	27/32
824 06.05.1949 **(P24)**	Ethiligoda Gamage Hinnihamy and Nanayakkarawasan Wakwella Gamage Francis (Mortgagors)	Mortgage	27/32

The deeds **P21, P22**, P23 and P24 were relied upon by the Plaintiff in order to prove prescription to the undivided half share of Jeremias Appuhamy.

In **P21**, Cicilihamy who had a life-interest and Don Diyes (the Plaintiff's privies) had leased out the fruits (the plantation) of the entire land to Franciscu Appuhamy. There is no evidence in the case *though* that the lessee Franciscu Appuhamy came on the land and enjoyed the fruits.

In **P22**, Don Diyes had leased out 27/32 shares of the soil and trees excluding the house on the land to one Balappu.

In **P23** of 1938, which is a mortgage bond, Don Diyes (the Plaintiff's privy) and his wife Hinnihamy dealt with 27/32 shares and after the death of Don Diyes, his widow Hinnihamy and a son Francis had leased out in 1949 27/32 shares on **P24.**

The learned Additional District Judge concluded that these notarially attested instruments "**P21** to **P24**" provide evidence of ouster leading to prescription. Needless to say, a transaction in 27/32 shares of the corpus is certainly over and above the paper title of the Plaintiff's predecessor which was only 1/32nd share in the other half. So when Don Diyes

dealt with 27/32 shares, he did encroach upon the portion of the remaining half share of Jeremias Appuhamy.

By transacting in 27/32nd shares of the land, Don Diyes and his widow let out on lease and mortgage more than what they were entitled to on paper title but yet about 1/8th of the half share of Jeremias still remained intact, even if it could be argued that the 1/32nd share of the 5th to 9th Respondents were not touched at all. In other words the entirety of one half of Jeremias' share was not dealt with by the Plaintiff's privies except **P21** where they purported to lease out the fruits of the entire land. But there is no evidence that these transactions brought on the land outsiders who read the riot act to the 5th to 9th Defendants who had been on the land for a long time. Notwithstanding these features in these transactions, the learned Additional District Judge of *Galle* proceeded to hold that the Plaintiff and the 1st to 4th Defendants had prescribed to one half of Jeremias Appuhamy's share.

Mr. Amrit Rajapakse impugned the findings of the learned Additional District Judge on prescription on 2 principal grounds:-

1. The transactions to lease out and mortgage 27/32nd shares were all done in secrecy and behind the back of the 5th to 9th Defendants who were still co-owners having an undivided 1/32nd share.

2. Prescription must relate to a defined portion on the ground and it cannot be in shares as the Plaintiff and his predecessors have done in this case - All the transactions no doubt deal in fractional shares of 27/32and they are not rooted to a particular defined and specific portions of the corpus.

These two questions raise questions of law and it is on these questions that the resolution of this appeal is rooted.

In regard to the 1st question, it is axiomatic that the 5th to 9th Defendants became the co-owners in 1918, when their father Jeremias Appuhamy acquired 1/32nd share of the land from Cicilihamy. Their mother Sopihamine was a niece of Cicilihamy and on the marriage of her niece to Jamis Appu (the father of the 5th to 9th Defendants), Cicilihamy gifted 1/32nd

share to Jamis Appu in 1918. Thus since 1918 their privy Jamis Appuhamy and the 5th to 9th Defendants had been in possession of the land. Even the 4th Defendant who gave evidence on behalf of the 1st to 4th Defendants concedes this position. Even when one peruses the preliminary plan and the report, it is clear that the houses of the 5th to 9th Defendants are scattered across the land and it would appear that these buildings occupy a larger portion in the middle of the land. While this state of affairs remained on the ground, the Plaintiff's privies who also had undivided shares in the land (16/32) were seeking to deal with more than their share totaling up to 27/32 shares. A fractional share of 27/32 would definitely touch not only a portion of the remaining ½ of Jeremias Appuhamy but also 1/32nd share of the 5th 9th Defendants.

The fact that the 5th to 9th Defendants came to know about the existence of these deeds only during the course of the trial is quite apparent. Can the Plaintiffs in these circumstances rely on P21, P22, P23 and P24 to argue that they have prescribed to the ½ share of Jeremias Appuhamy?

Can one argue that by executing the deeds P21, P22, P23 and P24, the Plaintiff's privies ousted the other co-owners and even the heirs of Jeremias Appuhamy if there was any of them? The tenor of authorities on this question of law goes against the conclusion of the learned Additional District Judge of *Galle*. Mr. Amrit Rajapakse adverted to Prof. G.L. Peiris's Law of Property in Sri Lanka Volume-1 at page 363 that deals with this question of law.

The following cases set out the law on the question whether one co-owner can oust another co-owner and claim prescription by alienation of the entirety or part of the co-owned land.

In ***Corea v. Iseris Appuhamy*** (1911) 15 N.L.R 65, the defendant who attempted to set up a prescriptive title against his co-owners, had *de facto* possession of the whole estate for over thirty years. The trial Judge found that, during this period, he had planted, leased, mortgaged and sold various lands and generally dealt with them as owner. In spite of this

and other findings of fact in favour of the defendant, the Privy Council refused to uphold his claim to tile by prescriptive possession.

In the case of ***Careem v. Ahamadu*** (1923) 5 Ceylon Law Recorder 170, Thomas Forrest Garvin, A.J with Porter, J. agreeing held that the mere fact that one co-owner was in occupation of the entirety of a house which was owned in common and purported to execute deeds in respect of the entirety for a period of over ten years does not lead to the presumption of an ouster in the absence of evidence to show that the other co-owners had knowledge of the transactions. The same principle was affirmed in ***Sideris v. Simon*** 46 N.L.R 273 where there was also no evidence that the contesting co-owners knew of the execution of the various deeds by one co-owner, Howard C.J. (with Canekeratne, J. agreeing) observed: "This deed ignores the rights of the daughters of **H.** But do these deeds inevitably point to an acquiescence by the daughters of H in the acquisition of their rights as co-owners by the sons? Was the making of these deeds something equivalent to an ouster?" Based on the decision in ***Tillekeratne v. Bastian*** 21 N.L.R 12, the learned Chief Justice said, "without such proof there was nothing more than a secret intention in the minds of the transferors and lessors to initiate a prescriptive title and put an end to the co-owners' co-possession. This is not sufficient to constitute ouster".

A co-owner who is in possession of the entirety of a property and whose execution of deeds in respect of it is without the knowledge of other co-owners cannot give rise to an inference of ouster. The criterion of awareness by the other co-owners was emphasized in ***Ummu Ham v. Koch*** (1946) 47 N.L.R 107 where M.W.H. De Silva, J. (with Howard C.J agreeing) held that: "mere possession and the execution, without the knowledge of the other co-owners, of deeds referring to the whole of the common property by a co-owner are not sufficient to constitute an ouster".

A co-owner cannot by a secret intention formed in his own mind change the character of his possession of the common land to the detriment of his co-owners. The mere fact that a co-owner who was in occupation of the common property purported to execute deeds in respect of the entirety of it for a long period of years without the knowledge of the other co-owners does not lead to the presumption of an ouster in the absence of evidence to

show that the other co-owners had knowledge of the transactions-***Kobbekaduwa v. Seneviratne*** 53 N.L.R 354.

In the case of ***Githohamy v. Karanagoda*** 56 N.L.R 250, a co-owner made a plan of a definite portion of the common land and improved and possessed it for a period of 40 years to the exclusion of other co-owners who possessed other portions of the same land. The Supreme Court took the view that, in the absence of evidence to establish that the other co-owners acquiesced in the preparation of the plan, the production of the plan by itself was insufficient either to establish an amicable partition among the co-owners or to justify a presumption of ouster.

The rationale underlying this statement of the law was spelt out as follows by Basnayake C.J (with Pulle, J. concurring) in ***Gunawardena v. Samarakoon*** (1958) 60 N.L.R 481, "The possession of one co-owner is the possession of the other co-owners, and that possession qua co-owner cannot be ended by any secret intention in the mind of the possessing co-owner. The latter proposition is in accordance with the maxim, *nemo sibi causam possessionis mutare potest*. The possession of one co-owner does not become possession by a title adverse to or independent of that of the others till ouster or something equivalent to ouster takes place.

These catena of authorities establish 2 propositions in regard to alienations made by one co-owner in respect of the entirety or part of the co-owned property. In order to prove ouster of a co-owner, the Plaintiff must prove 2 things;

1. the Defendant co-owner knew about the transfers;
2. he acquiesced in the transfers.

There is no evidence of all this in this case. The learned Additional District Judge of *Galle* was oblivious to all these principles and committed a cardinal error when he relied upon the aforesaid deeds to infer ouster. In the circumstances, I conclude that the Plaintiff and the 1st to 4th Defendants have not proved ouster and there is no prescriptive title they have established in regard to the undivided half share of Jeremias Appuhamy. There was also another fundamental argument that Mr. Amrit Rajapakse urged-namely, in order for a co-

owner to successfully set up prescriptive title against his other co-owners, it is necessary for him to physically possess a defined portion of the co-owned land to the exclusion of the other co-owners. The learned Counsel contended that adverse possession on the part of a co-owner must be based on physical possession of a defined and demarcated portion of the corpus.

One cannot but detect the great force in this argument. It is axiomatic that Section 3 of the Prescription Ordinance embodies both a physical element and a mental element. The physical element must be referable to possession in respect of a defined portion of land. The mental element consists of the intention of possessing as owner which is felicitously called *ut dominus* possession. Roman Law classified *ut dominus* possession as possession *qua* an owner. In fact in the full bench decision of the Supreme Court in ***Tillekeratne v. Bastians*** (1918) 21 N.L.R 12 at p 20, Bertram C.J., declared:

> *"If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as memory reaches, that they have nothing to recognize the claims of the other co-owners....."*

The above passage clearly postulates that the adverse possession must be pivoted and rooted to a defined portion of land. A series of secret dispositions of 27/32 fractional shares by way of leases and mortgages without specifying defined and demarcated portions of the land does not manifest any physical possession nor does it indicate *ut dominus* possession. I have already alluded to the situational habitation of the parties. The preliminary plan only shows that both the Plaintiff and the 5th to 9th Defendant-Appellants have been jointly enjoying the corpus, without any physical boundaries. Therefore the basic requirements for establishing prescriptive possession are woefully absent in the case before me.

In the circumstances I proceed to hold that the Plaintiff has not established any prescriptive right to the half share of Jeremias Appuhamy. It goes without saying that even the 5th to 9th Defendant-Appellants have not established any rights to the half share of Jeremias Appuhamy. Since neither party has established prescription, the one half share of Jeremias Appuhamy has to remain unallotted. The devolution through Nikulas Silva and

Cicilihamy to the Plaintiffs, 1st to 4th Defendants and 5th to 9th Defendants, as found by the District Court at page 7 of the judgment dated 29.09.1999, is unobjectionable and it is only the finding in relation to devolution of the half share of Jeremias Appuhamy that is erroneous.

In the circumstances I set aside the judgment of the learned Additional District Judge of *Galle* dated 29.09.1999 and allow the appeal of the 5th to 9th Defendant-Appellants. While giving effect to this judgment, the learned District Judge of *Galle* is directed to bear in mind that whilst the devolution in relation to one half share of Nikulas Silva would be in accordance with what the original Court judgment dated 29.09.1999 has stated as at page 7 of that judgment, the other half share of Jeremias Appuhamy has to remain unallotted.

The learned District Judge of *Galle* is directed to enter judgment and decree accordingly.

JUDGE OF THE COURT OF APPEAL