

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

Ethugal Pedige Durayalage Keerthieratne
of "Kumudu", Nagollagoda,
Nagollagoda Post.

PLAINTIFF

C.A. Case No.461-462/2000 (F)

D.C. Kuliyapitiya Case
No.7502/L

-Vs-

1. Ethugal Pedige Durayalage Gunaratne
2. Ethugal Pedige Durayalage Channawathie
3. Ethugal Pedige Durayalage Sirisena
4. Ethugal Pedige Durayalage Somapala
All of Widiyawala, Nagollagoda.
5. Kadakarandi Nadarge Parwathie Amma
6. Kadakarandi Nadarge Mary Amma
7. Ramassamige Jaya Lechchima
8. Ramassamige Welaiyudam
9. Ramassamige Chandrasekaram
10. Ramassamige Rama Chandram
11. Wickrama Arachchige Jayasundra
- 11A. Wickrama Arachchige Premasiri Jayasundra
All of Hamannapahuwa, Nagollagoda.
12. Rajakaruna Munasinghge Piyasena Siriwardhana
of "Piyasiri" Stores, Hamannapahuwa,
Nagollagoda.

DEFENDANTS

AND

Rajakaruna Munasinghge Piyasena Siriwardhana
of "Piyasiri" Stores, Hamannapahuwa,
Nagollagoda.

12th DEFENDANT-APPELLANT

-Vs-

Ethugal Pedige Durayalage Keerthieratne
of "Kumudu", Nagollagoda,
Nagollagoda Post.

PLAINTIFF-RESPONDENT

1. Ethugal Pedige Durayalage Gunaratne
2. Ethugal Pedige Durayalage Channawathie
3. Ethugal Pedige Durayalage Sirisena
4. Ethugal Pedige Durayalage Somapala
All of Widiyawala, Nagollagoda.
5. Kadarandi Nadarge Parwathie Amma
6. Kadarandi Nadarge Mary Amma
7. Ramassamige Jaya Lechchima
8. Ramassamige Welaiyudam
9. Ramassamige Chandrasekaram
10. Ramassamige Rama Chandram
11. Wickrama Arachchige Jayasundra (Deceased)
- 11A. Wickrama Arachchige Premasiri Jayasundra
All of Hamannapahuwa, Nagollagoda.

1st to 10th & 11A DEFENDANT-RESPONDENTS

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

COUNSEL : Chula Bandara with S.C. Samarakoon for the 12A Defendant-Appellant in CA 461/00 and the 11A Defendant-Appellant in CA 462/00
M.C. Jayaratne with M.D.J. Bandara for the Plaintiff-Respondent

Decided on : 28.08.2018

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

The Plaintiff-Respondent above named (hereinafter sometimes referred to as “the Plaintiff”) instituted the action bearing No.7502/P in the District Court of Kuliyaipitiya against 1st to 12th Defendant-Respondents seeking to partition a land called “Vijakarayagewatta” and “Kongahayaya” situated at Hamanna Pahuwa in an extent of 6 acres and 39 perches (A:6 R:0 P:39) as more fully described in the schedule to the plaint.

While denying several averments in the said plaint of the Respondent, 5th Defendant-Respondent and the 11th and 12th Defendant-Appellants above named filed their separate statements of claims and prayed for, *inter alia*, that:-

- a. the Lot 1 in Plan No.750 be excluded or in the alternative an undivided 5/10 be allotted to the 5th Defendant-Respondent-see Statement of Claim of the 5th Defendant-Appellant;
- b. the dismissal of the action of the Plaintiff or in the alternative Lot 3A in Plan No.1612 be allotted to the 11th Defendant-Appellant-see Statement of Claim of the 11th Defendant-Appellant;
- c. the dismissal of the action of the Plaintiff or in the alternative an undivided 2517/3996 be allotted to the 12th Defendant-Appellant-see Statement of Claim of the 12th Defendant-Appellant.

Upon the above pleadings, the trial commenced 09.10.1995 and the Plaintiff raised Issues Nos.1-2, whilst Issue Nos.3-4, Nos.5-8 and Nos.9-11 were raised respectively on behalf of the 5th Defendant, 11th Defendant and 12th Defendant-Appellants. The Plaintiff Keerthiratne gave evidence himself and closed his case by producing documents marked X, Y, P1, P2 and P3 on 03.02.1997 and the 5th Defendant-Respondent gave evidence for herself and did not produce any documentary evidence on her behalf. On 11.12.1998, the 11th Defendant-Appellant gave evidence for himself and called another witness and closed his case by producing documents marked 11V1, 11V2, XI and YI and on 17.07.1999, the 12th Defendant-Appellant gave evidence for himself and closed his case by producing documents marked 12V1 and as he had asserted in his statement of claim was based on prescription. But no other witness was called to substantiate his claim of prescription. After the conclusion of the trial and tendering of the written submissions of the respective parties, the learned District Judge of *Kuliyapitya* pronounced his judgment dated 28.07.2000 allowing the partition of the land in question-see page 217 of the appeal brief.

Being aggrieved by the judgment dated 28.07.2000, the 11th and 12th Defendant-Appellants preferred these appeals bearing Nos.461/2000(F) and 462/2000(F) and both Counsel made oral submissions and submitted written submissions in order to support their cases.

The title had devolved on the original owners by a land settlement order and it would appear that when the Plaintiff marked in evidence the documents X, Y, P1, P2 and P3 they were all admitted without any demur by the Defendants inclusive of the 11th and 12th Defendant-Appellants. This confirmed the title to the land devolving from the crown and therefore, once the paper title is proved, it is the burden on the part of the 11th and 12th Defendant-Appellants to prove their superior title by way of prescription and it was the contention of the learned Counsel for the Plaintiff-Respondent Mr. M.D.J. Bandara that the 11th and 12th Defendant-Appellants were not able to discharge their burden. The learned Counsel pointed out that there was no overt act on the part of the 11th and 12th Defendant-Appellants to establish ouster of the other co-owners such as the Plaintiff-Respondent.

As was quite succinctly pinpointed in *Maria Fernando and Another v. Anthony Fernando* (1997) 2 Sri L.R 356:-

“Long possession, payment of rates and taxes, enjoyment of produce, filing suit without making the adverse party, a party, preparing plan and building house on land and renting it are not enough to establish prescription among co-owners in the absence of an overt act of ouster. A secret intention to prescribe may not amount to ouster.”

Neither the 11th Defendant-Appellant nor the 12th Defendant-Appellant offered any evidence to demonstrate a starting point from which prescription would have begun. On the other hand they admitted co-ownership when the Plaintiff produced his documentary evidence.

The learned Counsel for the 11th Defendant-Appellant Mr. Chula Bandara put forward the following arguments at the hearing.

- a. the learned District Judge has failed to take into account the fact that the 11th Defendant-Appellant has established his right of prescription to the specific lot 3A depicted in Plan No.1612 (XI);
- b. that the Plaintiff's title originally deriving from Pavada & Sandanam Nadachchi, in equal shares has not been proved;
- c. that the identification of the corpus referred to in the schedule to the plaint has not been established.

I would not venture to comment on the first argument as I have already dealt with the issue of prescription. The 11th and 12th Defendant Appellants accepted the co-ownership deriving from Sandanam Nadachchi and the land settlement order which bestowed ownership was produced and marked as P1 at the trial, without any objections from the Appellants. The parties remained co-owners and not a tittle of evidence was available at the trial to demonstrate that a superior title such as prescription had put an end to co-ownership.

According to Issues Nos.5, 6, & 7 of the 11th Defendant-Appellant raised on 09.10.1995, he took the stance that lot 3A in Plan No.1612 (XI), which is depicted as lot 3 in preliminary Plan No.750 (X), had been possessed by as a distinct and discrete entity and by virtue of that alleged exclusive possession, he had claimed a prescriptive title to Lot 3A. But as I said, no evidence of prescriptive title emanating from adverse possession was proffered before the court *a quo* and merely because parties have possessed distinct lots for convenience, it does not give rise to adverse possession as was pronounced in *Dona Cecilia v. Cecilia Perera & Others* (1987) 1 Sri L.R at 235-239; 1 CALR 26 (SC):-

“Where a land is divided with the consent of all the co-owners but no cross-conveyances are executed in respect of the lots, co-ownership terminates only after undisturbed, uninterrupted and exclusive possession of the divided lots for a period of over ten years.although the plan of division was not signed by the co-owners and no cross-conveyances were executed, with ten years of such possession the co-owners would acquire prescriptive title to their respective lots.....”

In the instant case, the arrangement proposed as per Plan No.1612 (XI), tendered by the Appellant has not been executed at all. Even without the execution of the plan there could be prescriptive title but no evidence was forthcoming to establish undisturbed, uninterrupted and exclusive possession. It is trite that a secret intention to prescribe may not amount to ouster. Thus upon a consideration of the totality of evidence I conclude that the Appellant cannot claim any prescription to the said lot 3 in Plan No.750 (X).

The learned Counsel Mr. M.D.J. Bandara argued that it was too late in the day for the Counsel for the Appellants to raise on-identification of the corpus at the hearing of the appeal. The argument on non-identification of the corpus was taken up by the Counsel for the Appellant, for first time at the hearing of this appeal. The parties went on the basis that the preliminary survey plan reflected the corpus described in the schedule to the plaint and the trial has been conducted on the identity of the corpus.

It was held in the case of *Gunawardena v. Deraniyagala* (2010) 1 Sri L.R at page 309:-

“According to our procedure it is not open to a party to put forward a ground for the first in appeal, if the said point has not been raised at the trial under the issues so framed.”

The 11th Defendant-Appellant would be estopped to raise non-identification of the corpus as it was his case that he claimed Lot 3 in the preliminary Plan bearing No.750 (X)-see Issue No.7 raised at the trial. His claim of prescriptive title was raised in respect of Lot 3 in the preliminary plan and now he cannot blow hot and cold. The preliminary plan has been accepted without demur.

The substituted 11th Defendant, namely W.A. Premasiri Jayasundera accepted the said preliminary Plan No.750 (X) at page 1 thus:-

ප්‍ර: දැන් මේ නඩුව සඳහා පැමිණිලිකරු මැනලා තියෙනවා ඉඩමක්?

උ: ඔව්

ප්‍ර: ඒ ඉඩම මේ නඩුවට ඉදිරිපත් කර ඇති අංක 750 දරණ X වගයෙන් සලකුණු කරල තියෙන පිඹුරේ නිරූපනය කරල තියෙනවා ලොට් 1, 2 සහ 3 වගයෙන්?

උ: ඔව්

Thus this Court cannot find a dispute as regards a discrepancy between the land described in the schedule to the plaint and the land depicted in the preliminary plan.

In the circumstances I conclude that there is no merit in the two appeals that have been preferred to this Court and I proceed to affirm the judgment of the District Court of *Kurunegala* dated 28.07.2000 and dismiss the appeals.

JUDGE OF THE COURT OF APPEAL