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

C. A. No. 586/99 (F)

D. C. Gampaha No. 36204/P

1A. Rupasinghe Arachchige
Jayawathie of
Mudagamuwa,
Bemmulla.
And 09 others

DEFENDANT-APPELLANTS

-VS-

1A. Wijesinghe Ratnayake
Appuhamilage
Kumudusiri
No. 42, Kiridiwita,
Gampaha

PLAINTIFF-RESPONDENT

BEFORE : **M. M. A. GAFFOOR, J.**

COUNSEL : Manohara de Silva P.C. with Nimal Hippola for the Defendant-Appellants

M. P. Ganeswaran for the 1A Plaintiff-Respondent

WRITTEN SUBMISSIONS TENDERED ON : 20.03.2018 (Defendant-Appellants)
22.06.2018 – Amended Written Submission (Plaintiff-Respondent)

DECIDED ON : **30.10.2018**

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M. M. A. GAFFOOR, J.

This is an appeal from the judgment of the Learned District Judge of Gampaha in respect of a Partition Action bearing case Number 36204/P. The Plaintiff-Respondent (hereinafter referred to as the 'Respondent') instituted this action seeking to partition the land called "Kahatagahawatta" depicted in Plan Number 864 dated 14.06.1996 made by L. A. G. Perera, Licensed Surveyor produced and marked as "X" and filed of record.

The Respondent in her Plaint dated 07.06.1993, sought an interim injunction and an enjoining order against the 1st to 6th Defendants preventing them from constructing a building besides partitioning of the corpus as pleaded.

Prior to the commencement of the trial both parties came to a settlement and the 1st to 6th Defendants agreed to stop the constructions (*vide page 49 in the Appeal brief*).

At the trial, the Substituted Plaintiff gave evidence and stated that the Original owner of the corpus was Chala Fernando who transferred his title to Herath Singho. Herath Singho was unmarried and his rights devolved on his mother Mencho Hamy and later on her daughter Elisa Hamy.

Elisa Hamy gifted undivided 1/2 share to Kirinelis as per Deed No. 48622 dated 06.11.1965 (marked as 1වි1 at page 139) and the balance 1/2 share to the Plaintiff by Deed No. 48690, attested by P. P. Jayawardena, Notary Public dated 15.11.1965 marked as වැ 1 (*page 134 of the Appeal brief*).

Kirinelis died intestate, accordingly the 1st Defendant, the widow entitled to 1/2 share and the 2nd to 6th Defendants entitled to the balance 1/2 of Kirinelis's share of the corpus.

1st to 6th Defendants filed their answers on 23.07.1997 and claimed entirely of the questioned land on Prescription.

The Defendants' position is that the Plaintiff is not entitled to any rights in the land sought to be partitioned and as well as 1st to 6th Defendants have had possession of the corpus for over 10 years. Therefore, they had argued that there is sufficient evidence to establish prescriptive title against the Plaintiff.

At the end of the trial, the Learned District Judge delivered his judgment dated 07.07.1999 in favour of the Plaintiff. Being aggrieved by the said judgment, the Defendant-Appellants appealed to this Court seeking to set aside the judgment and interlocutory decree.

It is settled law that according to the provisions of section 3 of the Prescription Ordinance Act, No 2 of 1889 the claimant must prove the following elements:-

1. Undisturbed and uninterrupted possession
2. Such possession to independent or adverse to the claimant and
3. Then (10) years previous to the bringing of such action.

In order to initiate a prescriptive title, it is necessary to show a change in the nature of the possession and the party claiming prescriptive right should show an ouster.

According to the evidence presented at the trial it is revealed that the Respondent and the Defendants are blood relations and the questioned corpus is an undivided land. And both parties claimed that the right of the corpus through the same person namely Elisa Hamy.

The Substituted Plaintiff produced a Deed No. 48690 dated 15.11.1965 attested by P. P. Jayawardena, Notary Public marked as පැ 1 and claimed that his late mother (the Plaintiff) received the balance 1/2 share of Elisa Hamy in the questioned land. This fact was testified by the Substituted Plaintiff (Respondent) as follows:-

> "පැ 1 න් එලිසා හාමි 1/2 කොටසක් මගේ මෙන මව්වන පැමිණිලිකාරියට අයිතිවාසිකම් දුන් බව මා කිව්වා..."
>
> (*Vide page 55 in the Appeal brief*).

The 2nd Defendant also testified in the cross examination as to wit,

Q: එලිසා හාමිගේ අයිතිය අරලින් නෝනාට ඔප්පුවකින් ලියා තිබුන බව තමුන් පිලිගන්නවා?

A: ඔව්.

Q: තමුන්ගේ පුංචි අම්මා අරලින් නෝනා, පොලිසි ගිහින් ආරවුල් කරලා නැහැ මෙ සම්බන්ධව තමුන්ලා එක්ක?

A: නැහැ.

Q: ඒ ඔප්පුව වලංගු නම්, ඒ අයිතිවාසිකම් අරලින් නෝනාට යන්න ඕනෑ?

A: ඔව්. වලංගු නම් යන්න ඕනෑ.

(At page 73 of the Appeal brief)

In **Corea vs. Appuhamy** (1911) 15 NLR 65 the Privy Council held that the possession of a co-owner was in law, the possession of the other co-owners and thus, not adverse to them. In other words even if one co-owner's possession of the common property or part thereof was of a character incompatible with the title or the other co-owners, yet that co-owner possess the common property on behalf of all co-owners. It was not possible for him to put an end to the possession by any secret intention in his mind, nothing short of ouster, or something equivalent to ouster could bring about this result.

In Corea vs. Appuhamy, the Privy Council decision laid down for the first time in clear and authorities terms the following principles:

1. The possession of one-owner, was in law, the possession of others;
2. Every co-owner must be presumed to be possessing in that capacity;
3. It was not possible for such a co-owner to put an end to that title and to initiate a prescriptive title by any secret intention in his own mind; and
4. That nothing short of an ouster could bring about that result.

In **Wickramaratne and Another vs. Alpenis Perera** (1986) (1) SLR 190, G. P. S De Silva, J. held that,

> *"In a partition action for a lot of land claimed by the plaintiff to be a divided portion of a larger land, he must adduce proof that the co-owner who originated the division and such co-owner's successors had prescribed to*

that divided portion by adverse possession for at least ten years from the date of ouster or something equivalent to ouster. Where such co-owner had himself executed deeds for undivided shares of the larger land after the year of the alleged dividing off it will militate against the plea of prescription. Possession of divided portions by different co-owners is in no way inconsistent with common possession."

"A co-owner's possession is in law the possession of the co-owners every co-owner is presumed to be in possession in his capacity as co-owner. A co-owner cannot put an end to his possession as co-owner by a secret intention in his mind Nothing short of ouster or something equivalent to ouster could bring about that result." (Page at 190 &191)

In **Tillekeratne vs. Bastian** (1918) 21 NLR 12, Betram, C. J. referring to the real effect of the decision in **Corea vs. Appuhamy** upon the interpretation of the word **"adverse"** with reference to cease of co-ownership stated that the word must be interpreted in the context of three principle of Law:-

1. *Every co-owner having a right to possess and enjoy the whole property and every part of it, the possession of one co-owner in that capacity is in law the possession of all.*

2. *Where the circumstances are such that a man's possession may be referable either to an unlawful act or to a lawful title, he is presumed to possess by virtue of the lawful title.*

3. *A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity. (Page at 19)*

In the present matter the Defendants clearly knew from the beginning that the corpus in dispute is a co-owned property. Though the Defendants have sought title under prescription for long term possession they have not provided any cogent evidence to prove the same and for adverse possession.

Though the Defendants have possessed the corpus knowing it is a co-owned property here is no such evidence presented at the trial by the 2nd Defendant to support their claim.

The only evidence was once when the Plaintiff went to the questioned land, the father of the 2nd Defendant told her as,

> "...පුංචි අම්මා ආව අවස්ථාවක තාත්තා කිව්වා, උඹට අයිතියක් නැහැ. පලයන් යන්න කියා." *(Vide page 71 in the Appeal brief).*

To prove a prescription against a co-owner there must be cogent evidence if he is a family member for adverse possession and for prescriptive title against to other co-owner.

It is noted that the 1st to 6th Defendants mere possession for a long period does not quality them to claim absolute ownership and they had failed to prove an over act of ouster.

For the forgoing reasons, I see no reasons to interfere with the judgment of the learned District Judge; and dismiss the appeal with Costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL