

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

Herath Mudiyansele Sarath Chandra
Herath,
Postal Division of Mahawewa,
Mahawewa

Plaintiff

S.C. Appeal No. 132/2010

SC/HCCA/LA 30/2010

Vs.

H.C.C.A. Kurunegala Case No. 102/2020(F)

D.C. Kuliapitiya Case No.11298/P

1. Rathnayake Mudiyansele
Kusumawathie,
C/O, A.M. Jayathilaka,
Postal Division of Kottaramulla,
Paluwelgala.
2. Rathnayake Mudiyansele Somawathie,
Near the Aswedduma Temple,
Postal Division of Kuliapitiya.
3. Herath Mudiyansele Gamini Herath,
Postal Division of Welipennagahamulla,
Gallahemulla.
4. Rathnayake Mudiyansele Jayasinghe
Ratnayake, Yakwila,
Kithalahitiyawa.
5. Rathnayake Mudiyansele
Abeyarathana,
Postal Division of Yakwila,
Kithalahitiyawa.

6. Jahapu Appuhamilage Malanie
Hemalatha,
Postal Division of Yakwila,
Kithalahitiyawa.
7. Rathnayake Mudiyansele Priyanthika
Mali Ratnayake,
Postal Division of Yakwila,
Kithalahitiyawa.
8. Rathnayake Mudiyansele Inoka
Shamalee Ratnayake,
Postal Division of Yakwila,
Kithalahitiyawa.
9. Rathnayake Mudiyansele
Harischandra,
Postal Division of Yakwila,
Kithalahitiyawa.
10. Rathnayake Mudiyansele Lakshman
Kithsiri Ratnayake,
Postal Division of Yakwila,
Kithalahitiyawa.

Defendants

AND BETWEEN

Herath Mudiyansele Sarath Chandra
Herath,
Postal Division of Mahawewa,
Mahawewa.

Plaintiff-Appellant

Vs.

1. Rathnayake Mudiyansele
Kusumawathie,
C/O, A.M. Jyathilaka,
Postal Division of Kottaramulla,
Paluwelgala.

2. Rathnayake Mudiyansele
Somawathie, Near the Aswedduma
Temple,
Postal Division of Kuliya.
Kithalahitiya.
3. Herath Mudiyansele Gamini Herath,
Postal Division of Welipennagahamulla,
Gallahemulla.
4. Rathnayake Mudiyansele Jayasinghe
Ratnayake, Yakwila,
Kithalahitiya.
5. Rathnayake Mudiyansele
Abeyarathana, Postal Division of
Yakwila,
Kithalahitiya.
6. Jahapu Appuhamilage Malanie
Hemalatha, Postal Division of Yakwila,
Kithalahitiya.
7. Rathnayake Mudiyansele Priyanthika
Mali Ratnayake,
Postal Division of Yakwila,
Kithalahitiya.
8. Rathnayake Mudiyansele Inoka
Shamalee Ratnayake,
Postal Division of Yakwila,
Kithalahitiya.
9. Rathnayake Mudiyansele
Harischandra, Postal Division of Yakwila,
Kithalahitiya.

10. Rathnayake Mudiyansele Lakshman
Kithsiri Ratnayake,
Postal Division of Yakwila,
Kithalahitiyawa.

Defendant-Respondents

AND NOW BETWEEN

4. Rathnayake Mudiyansele Jayasinghe
Ratnayake,

4A. Rathnayake Mudiyansele Sumeda
Ratnayake, Yakwila,
Kithalahitiyawa.

Defendant-Respondent-Appellant

Vs.

Herath Mudiyansele Sarath Chandra
Herath,
Postal Division of Mahawewa,
Mahawewa.

Plaintiff-Appellant-Respondent

1. Rathnayake Mudiyansele
Kusumawathie,
C/O, A.M. Jyathilaka,
Postal Division of Kottaramulla,
Paluwelgala.

2. Rathnayake Mudiyansele
Somawathie, Near the Aswedduma
Temple,
Postal Division of Kuliypitiya.

3. Herath Mudiyanseleage Gamini Herath,
Postal Division of Welipennagahamulla,
Gallahemulla.
5. Rathnayake Mudiyanseleage
Abeyarathana, Postal Division of
Yakwila,
Kithalahitiyawa.
6. Jahapu Appuhamilage Malanie
Hemalatha, Postal Division of Yakwila,
Kithalahitiyawa.
7. Rathnayake Mudiyanseleage Priyanthika
Mali Ratnayake,
Postal Division of Yakwila,
Kithalahitiyawa.
8. Rathnayake Mudiyanseleage Inoka
Shamalee Ratnayake,
Postal Division of Yakwila,
Kithalahitiyawa.
9. Rathnayake Mudiyanseleage
Harischandra, Postal Division of Yakwila,
Kithalahitiyawa.
10. Rathnayake Mudiyanseleage Lakshman
Kithsiri Ratnayake,
Postal Division of Yakwila,
Kithalahitiyawa.

Defendant-Respondent-Respondents

Before: Murdu Fernando, P.C., J.
Yasantha Kodagoda, P.C., J.
Janak De Silva, J.

Counsel:

W. Dayaratne, P.C. with R. Jayawardena for the Defendant-Respondent-Appellant
Dr. Sunil Cooray with Sudarshani Cooray for the Plaintiff-Appellant-Respondent

Written Submissions on:

22.02.2011 and 17.03.2021 by the Defendant-Respondent-Appellant
22.03.2011 by the Plaintiff-Appellant-Respondent

Argued on: 17.02.2021

Decided on: 04.10.2021

Janak De Silva, J.

The Plaintiff-Appellant-Respondent (Respondent) instituted this action in the District Court of Kuliyaipitiya for the partition of the land called Nelligahamula Watta alias Parahena alias Parawatta containing in extent A.2 R.2 P.8. There is no dispute between the parties as to the identity of the corpus. It is admitted that the corpus is more fully depicted in preliminary plan No. 3524 dated 21.03.1997 (X) prepared by licensed surveyor R.B. Navaratne.

Parties are also in agreement that Punchi Banda Ratnayake was allotted this land by partition decree in case No. 1553/P of District Court of Kurunegala dated 02.03.1972. The dispute revolves on the pedigree pleaded by the Respondent and the Defendant-Respondent-Appellant (Appellant).

According to the Respondent, Punchi Banda Ratnayake transferred an undivided one acre of the corpus to the Respondent by deed No. 3223 (P2) dated 15.03.1995 attested by R.K.R.F.J. Caldera, Notary Public. It is further contended that Punchi Banda Ratnayake died issueless on 24.09.1995 and therefore his brothers, sisters and their heirs, including the Appellant, succeeded to the balance portion of the corpus on intestate succession.

The Appellant on the contrary contends that Punchi Banda Ratnayake executed two deeds of transfer in favour of the Appellant, namely deed No. 5401 dated 21.09.1977 (4V3) for a divided one acre of the corpus and deed No. 908 dated 11.11.1980 (4V4) for a further undivided 1 ½ acre of the corpus. Alternatively, the Appellant contends that he has acquired prescriptive title to the corpus and sought a dismissal of the partition action.

The learned District Judge held that the paper title claimed by the Appellant lost priority to the paper title claimed by the Respondent since the two deeds relied on by the Appellant, namely deed No. 5401 dated 21.09.1977 (4V3) and deed No. 908 dated 11.11.1980 (4V4), were not registered in the correct folio in the land registry whereas deed No. 3223 (P2) relied on by the Respondent was registered in a folio which was connected to the folio in which the final decree in case No. 1553/P of District Court of Kurunegala was registered.

However, the learned District Judge concluded that the Appellant had prescribed to the corpus and dismissed the partition action.

The Respondent appealed to the High Court of Civil Appeal holden in Kurunegala. The High Court of Civil Appeal held that Punchi Banda Ratnayake possessed the corpus until his demise and that he had taken income derived from the coconut cultivation on the corpus. It was held further that the Appellant had failed to prove any ouster. The High Court of Civil Appeal set aside the judgment of the District Court and directed that the corpus be partitioned on the pedigree pleaded by the Respondent. Aggrieved by this judgment, the Appellant has filed this appeal.

Leave to appeal was granted on the following questions of law:

(a) Did their Lordships of the Civil Appellate High Court seriously misdirect themselves when they held that the subject matter of this case is co-owned land?

(b) Did their Lordships' Court of the Civil Appellate High Court fail to consider the finding of the Learned District Judge that the 4th Defendant/Respondent/Petitioner had exclusive possession for the corpus since 1980 although the 5th Defendant/Respondent/Respondent had undivided rights for only 10 perches (A0-R0-P10)?

I observe that Punchi Banda Ratnayake became the sole owner of the land sought to be partitioned by virtue of partition decree in case No. 1553/P of District Court of Kurunegala dated 02.03.1972. The land became co-owned again when he executed deed 5051 (4V1) dated 14.10.1976 for an undivided 1 ½ acre in favour of Asilin Nona. A further undivided 1 acre was transferred by him again to Asilin None by deed No. 5105 (4V4) dated 19.12.1976.

The total extent of land transferred to Asilin Nona as aforesaid was re-transferred by her to Punchi Banda Ratnayake by deed Nos. 6274 (4V6) dated 10.11.1980 and deed No. 5400 (4V5) dated 21.09.1977.

Punchi Banda Ratnayake transferred 2 ½ acres in total to the Appellant by deed No. 5401 (4V3) dated 21.09.1977, which is for an undivided one acre, followed by deed No. 908 (4V4) dated 11.11.1980, which is for an undivided 1 ½ acre.

Hence by 11.11.1980, the Appellant had paper title for an undivided 2 ½ acres and Punchi Banda Ratnayake held an undivided 8 perches of the corpus.

In evaluating the claim of prescriptive rights by the Appellant, one must bear in mind two significant legal principles governing prescriptive rights among co-owners.

In *Corea v. Appuhamy et al.* (15 N.L.R. 65) the Privy Council held that, in law, the possession of one co-owner is also the possession of his co-owners and that it was not possible to put an end to that possession by any secret intention in his mind and that nothing short of ouster or something equivalent to ouster could put an end to that possession.

Moreover as the Appellant and Punchi Banda Ratnayake are brothers, the required proof of change in the character of possession to adverse is greater than in a case where the parties are total outsiders [*De Silva v. Commissioner General of Inland Revenue* (80 N.L.R. 292)].

It was incumbent on the Appellant to prove a starting point for his prescriptive rights. His evidence is that he began possessing the corpus from 1980. This coincides with the execution of deed No. 908 (4V4) dated 11.11.1980 after which he became the owner of an undivided 2 ½ acres of the corpus. However, the possession of the Appellant did not in my view take the character of adverse possession from such inception due to the absence of evidence of change of character as the Appellant entered possession as a co-owner. [*Chelliah v. Wijenathan* (54 N.L.R. 337 at 342)].

Nonetheless, it is in evidence that between 1982/1984 the Appellant constructed a building on the corpus consisting of three rooms, which are being used as shops. This is shown in the preliminary plan No. 3524 (X) dated 21.03.1997 prepared by licensed surveyor R.B. Navaratne and was claimed only by the Appellant during the preliminary survey. Kareem Ismail testified that he constructed this building at the request of the Appellant who paid for its construction. At the preliminary survey, none of the other parties including the Respondent, claimed that these buildings were being held in common [Appeal Brief, page 105]. In my view these facts are cogent evidence in establishing the beginning of adverse possession in favour of the Appellant.

This position is further buttressed with the evidence that the Appellant leased these shops to third parties and exclusively appropriated the rentals to the exclusion of any other. The Appellant, by deed No. 7191 (4V7) dated 15.08.1984, leased one of the shops to Devendra for a period of five years from 15.08.1984. Chandralatha, a sister of Devendra, testified that she and her brother leased this shop from the Appellant in 1984 and that she is in occupation of it even as at 2002 when she testified. During her cross-examination on behalf of the Respondent, she testified that the rental was paid to the Appellant and that no rental was ever paid to Punchi Banda Ratnayake and that one Jayasekera who was occupying another shop also paid rent to the Appellant. The learned counsel appearing on behalf of the Respondent failed to challenge this evidence. Moreover, the Respondent testified that the present occupiers of the shops on the corpus are in occupation under the Appellant [Appeal Brief, page 92].

The Appellant also led the evidence of one Nandasoma who testified that he took on lease the corpus from the Appellant in 1981 for eight years to cultivate pineapple and that the cultivation covered an extent of 1 ½ acres of the corpus. Although no documentary evidence of the lease was produced, Nandasoma claimed that the receipt was lost, the 5th Defendant-Respondent-Respondent corroborated the fact that there was a pineapple cultivation on the corpus.

In order to counter the case of the Appellant, the Respondent testified that Punchi Banda Ratnayake possessed the corpus until his death in 1995 and used to live in a small house on the corpus [Appeal Brief, page 95]. However, it was mere *ipse dixit* and in this context it is important to bear in mind the principle that mere statements of possession are insufficient to establish prescriptive rights. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court [*Sirajudeen and two others v. Abbas* (1994) 2 Sri.L.R. 365]. In any event, this evidence was contradicted by the 2nd Defendant-Respondent-Respondent who testified that Punchi Banda Ratnayake lived in a small room on a land *adjoining* the corpus belonging to one of his brothers [Appeal Brief, page 173].

More importantly, the fact that Punchi Banda Ratnayake continued to possess the corpus is not credible given that he lost his undivided 8 perches share in the corpus when he executed deed No. 1866 (5V4) dated 04.11.1985 by which it was transferred to one Herath Mudiyansele Jayatilake who later transferred his share by deed No. 2314 (5V5) dated 01.09.1988 to the 10th Defendant-Respondent-Respondent. No evidence was led that either of them possessed the corpus thereafter. In fact, the preliminary plan No. 3524 dated 21.03.1997 (X) shows that the corpus has been possessed as one unit and that there are no boundaries indicating it as having being possessed as two distinct lots.

Hence, there is cogent evidence to establish that the Appellant had prescribed to the corpus by the time this action was filed in November 1995 as correctly held by the learned District Judge.

No doubt the Appellant did admit that the 5th Defendant-Respondent-Respondent had paper title to the balance undivided 8 perches. However, this admission was erroneous. Moreover the 5th Defendant-Respondent-Respondent testified that he did not enter into possession of the undivided 8 perches.

In any event, mere acknowledgement of the paper title of the 5th Defendant-Respondent-Respondent by the Appellant cannot, in my view, stand in the way of setting up a claim of prescriptive title as it is by very nature a mode of defeating paper title. In *Wijesundera & Others v. Constantine Dasa and Another* [(1987) 2 Sri.L.R. 66], G.P.S. De Silva J. (as he was then) held that the knowledge on the part of the defendant that title to the property was in another was not a bar to his claim to prescriptive title, but tended rather to strengthen their claim, having regard to all the facts and circumstances of that case. In my view, it applies with equal force to the facts and circumstances of this case as well.

More significantly, the 5th Defendant-Respondent-Respondent did not prefer any appeal against the judgment of the learned District Judge who held that the Appellant had established his prescriptive rights to the full extent of the corpus.

For the foregoing reasons, the High Court of Civil Appeal erred in concluding that the Appellant had failed to establish his prescriptive title. Accordingly, I answer the two questions of law in the affirmative.

I set aside the judgment of the High Court of Civil Appeal holden in Kurunegala dated 17.12.2009 and affirm the judgment of the learned District Judge of Kuliypitiya dated 11.11.2002 and direct that decree be entered accordingly. Registrar is directed to take steps accordingly.

The Appellant is entitled to his costs in both the High Court of Civil Appeal holden in Kurunegala and this Court.

Appeal allowed.

Judge of the Supreme Court

Murdu Fernando, P.C., J.

I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.

I agree.

Judge of the Supreme Court