IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

In the matter of an application for Leave to Appeal under and in terms of article 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5c of the High Court of Provinces (Special Provisions) Act No 54 of 2006.

SC/Appeal/35/2018

S.C.(HCCA) LA Case No. 579/2016

Case No: SP/HCCA/GA/42/2009 (F)

DC Galle Case No : 10993/P

Serasinghe Vidanage Somalatha,

Elabada, Ginthota.

Plaintiff

Vs

1. Aluthgamage Albert,

2. Aluthgamage Chitralatha,

   Both of:

   Sri Pagngnaloka Mawatha,

   Welipitimodara, Ginthota.

3. Serasinghe Widanage Somawathi,

   Mahaneliya Road,

   Walliwala, Weligama.

   (Deceased)

4. Serasinghe Widanage Karunadasa,

Mahaneliya Road,
Walliwala,Weligama.

5. Serasinghe Widanage Pagngnadasa,
Elabada, Ginthota.

6. Kathaluwa Gamage Seetin,
Neelagewaththa,
Kathaluwa, Ahangama.

7. Pansina,
Welipitimodara, Ginthota.
(Deceased)

8. Aluthgamage Bantis,
Sri Pagngnaloka Mawatha,
Welipitimodara,
Ginthota.
(Deceased)

8A. Lankapurage Rosinahami,
Sri Pagngnaloka Mawatha,
Welipitimodara,
Ginthota.
(Deceased)

7A. B.V. Vineris,
Welipitimodara,
Ginthota.

4A. Serasinghe Vidanage Somawathi,
Mahaneliya Road,
Walliwala, Weligama.

Defendants

And

1/8A. Aluthgamage Albert,

2. Aluthgamage Chitralatha,
Both of:
Sri Pagngnaloka Mawatha,
Welipitimodara,
Ginthota.

1/8A and 2nd Defendant-Appellants

Vs

Serasinghe Vidanage Somalatha,
Elabada, Ginthota.

Plaintiff-Respondent

3. Serasinghe Widanage Somawathi,
Mahaneliya Road,
Walliwala, Weligama.

4. Serasinghe Widanage Karunadasa,
Mahaneliya Road,
Walliwala,Weligama.

(Deceased)

5. Serasinghe Widanage Pagngnadasa,
Elabada, Ginthota.

6. Kathaluwa Gamage Seetin,
Neelagewaththa,
Kathaluwa, Ahangama.

7. Pansina,
Welipitimodara, Ginthota.

7A. B.V. Vineris,
Welipitimodara,
Ginthota.

4A. Serasinghe Vidanage Somawathi,
Mahaneliya Road,
Walliwala, Weligama.

Defendant- Respondents

And

Serasinghe Vidanage Somalatha
(Deceased)
Kodikarage Murin,
Withanagiri, Pokunugamuwa,
Weligama.

Substituted-Plaintiff-Respondent-Petitioner

Vs

1/8A. Aluthgamage Albert,

2. Aluthgamage Chitralatha

Both of:

Sri Pangnyaloka Mawatha,

Welipitimodara, Ginthota.

<u>1/8A and 2nd Defendant- Appellant- Respondents</u>

3. Serasinghe Widanage Somawathi,

Mahaneliya Road,

Walliwela, Weligama.

4. Serasinghe Widanage Karunadasa,

Mahaneliya Road,

Walliwala,Weligama.

5. Serasinghe Widanage Pagngnyadasa,

Elabada, Ginthota.

6. Kathaluwa Gamage Seetin,

Neelagewaththa,

Kathaluwa, Ahangama.

7. Pansina,

Welipitimodara, Ginthota.

(Deceased)

7A. B.V. Vineris,
Welipitimodara,
Ginthota.

4A. Serasinghe Vidanage Somawathi,
Mahaneliya Road,
Walliwala, Weligama.

Defendant- Respondent- Respondents

AND NOW

In the matter of an application for substitution

Serasinghe Vidanage Somalatha
(Deceased)
Kodikarage Murin,
Withanagiri, Pokunugamuwa,
Weligama.

Substituted-Plaintiff-Respondent-Petitioner-Appellant

Vs

1/8A. Aluthgamage Albert,
2. Aluthgamage Chitralatha
Both of:
Sri Pangnyaloka Mawatha,
Welipitimodara, Ginthota.

1/8A and 2nd Defendant-Appellant-Respondent-Respondents

3. Serasinghe Widanage Somawathi,

Mahaneliya Road,
Walliwala, Weligama.
(Deceased)

3A. Serasinghe Widanage Pagngnyadasa,
Mahaneliya Road,
Walliwala,
Weligama.

4. Serasinghe Widanage Karunadasa,
Mahaneliya Road,
Walliwala, Weligama.

4A. Serasinghe Widanage Somawathi,
Mahaneliya Road,
Walliwala, Weligama.

4B. Serasinghe Widanage Pagngnyadasa,
Mahaneliya Road, Walliwala,
Weligama.

5. Serasinghe Widanage Pagngnyadasa,
Elabada, Ginthota.

<u>New Address:</u>

Mahaneliya Road,
Walliwala, Weligama.

6. Kathaluwa Gamage Seetin,
Neelagewaththa,
Kathaluwa, Ahangama.
(Deceased)

6A. Serasinghe Widanage Somawathi
Mahaneliya Road,
Walliwala, Weligama.
(Deceased)

6B. Serasinghe Widanage Pagngnyadasa,
Mahaneliya Road, Walliwala,
Weligama.

7. Pansina,
Welipitimodara, Ginthota.
(Deceased)

7A. B.V. Vineris,
Weliptimodara, Ginthota.
(Deceased)

7B. Nevil Thushara,
Welipitimodara, Ginthota.

Defendant-Respondent-Respondent- Respondents

Before: B.P. Aluwihare, PC., J
Vijith K. Malalgoda, PC., J
Murdu N.B. Fernando, PC., J

Counsel: Sanjeewa Dasanayake with Ms. Dilni Premarathne instructed by M.S. Paul Ratnayake Associates for the Substituted-Plaintiff-Respondent-Appellant.
Suren Fernando with Ms. Khyati Wickramanayake for the 1/8A and 2nd Defendant- Appellant-Respondents.

Argued on: 23.06. 2020

Decided On: 14.11.2023

Judgement

Aluwihare PC J.,

This is an appeal against the judgment of the Civil Appellate High Court of Galle. The original action filed by the original Plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff) in the District Court of Galle for the partition of a land called '*Hamade Delgahawatta*". By the Plaint, 8 Defendants were made parties to the action and the Plaintiff sought to partition the aforesaid land according to the share allocation described in paragraph 10 of the Plaint.

By preliminary plan No.198 dated 31st March 1991 made by Bandula Silva Licensed Surveyor **(marked as 'X')** a land of 2 Acres, 1 Rood and 26.25 Perches was identified as the corpus which consists of two lots **namely Lot A and Lot B**.

The 1st/8A and 2nd Defendant-Appellant-Respondents (hereinafter referred to as the relevant Defendants) by their statement of objections disputed the corpus identified in the preliminary plan. They took up the position that a land called *Delgahawatta*

Addara Owita was included in the corpus identified by the aforementioned preliminary plan and sought the exclusion of that purported land from the corpus.

The surveyor, by having plan No.1490 [referred to in the statement of claim of the relevant Defendants], superimposed on the preliminary plan No.198, which was marked and produced as 'Y 1'. In the superimposed plan he had identified 3 lots namely A1, A2 and B. Of those lots, the relevant Defendants claimed A1 was the corpus, and prayed that the land sought to be partitioned by this action be identified as Lot A1 of the superimposed plan 'Y1', and for a declaration that they were the owners of the said Lor A1.

The Plaintiff's position was that none of the Surveyors had used earlier plans to demarcate boundaries but surveyed the land according to the metes and bounds as shown by the respective parties.

Thereafter the trial proceeded on 2 main contesting points,

1. the corpus and its extent and

2. the pedigree of title

The Plaintiff giving evidence claimed title as described in the schedule to the plaint and sought to partition the land among the co-owners as described therein.

The relevant Defendants while disputing the identification of the corpus took up the position that out of the entirety of Lot A1 in the plan marked 'Y1' their predecessor in title namely Bantis (the original 8th Defendant) has acquired prescriptive title to a 42/ 48th share which was almost the entirety of the corpus.

The District Court by its judgment dated 2nd April 2009, admitted the title and pedigree disclosed by the Plaintiff and further identified the corpus to be partitioned as Lot A1 in the Plan marked 'Y1' which is 1 Acre, 2 Roods and 13.75 Perches in extent. Upon analysing the evidence placed, the learned District Judge held the entitlement of parties as follows;

Plaintiff- 24/360, the 1st Defendant-55/360, the 2nd Defendant 55/360, the 3rd to the 6th Defendant 24/360 each, the 7th and 8th Defendants 65/360 each. All parties were allotted shares and it appears that the share allotted to the Plaintiff was the smallest, in terms of extent.

Aggrieved by the aforesaid judgment, the relevant Defendants preferred an appeal to the Civil Appellate High Court of the Southern Province Holden in Galle.

The relevant Defendants did not dispute the findings of the District Court with respect to the identification of the corpus, however they challenged the findings relating to the pedigree and in particular the findings with regard to prescriptive title.

The Civil Appellate High Court delivered its judgment *inter alia* granting prescriptive title of the entirety of the corpus (Lot A1 in Plan marked Y1) to the relevant Defendants. It is of relevance to note that the learned High Court Judges have reproduced the entirety of the written submission filled on behalf of the relevant Defendants in their judgement and had overturned the findings of the learned District Court Judge. The judgement of the High Court commences on page 04 and runs into page 22. The entire judgement is nothing but a reproduction of the written submission of the Defendants, save for the last paragraph which says, "for the foregoing reasons we set aside the answers by the learned District Judge to issues 24 to 29 by holding that 8A/1 and 2nd Defendant-Appellants have in fact prescribed to Lot A1 in Y1." This Court takes serious note of this conduct, which cannot be condoned under any circumstances and this Court is strongly of the view that judges should not resort to such conduct.

It appears to me that the learned High Court Judges have failed in their duty to consider the respective cases of both the Plaintiff and the relevant Defendants. However, the only issue that this Court has to consider is whether the said Defendants have prescribed to the corpus of A1.

Aggrieved by the said judgment of the Civil Appellate High Court the Plaintiff appealed to this Court seeking relief. The Plaintiff however did not wish to challenge the decisions of the District Court and High Court with regard to the identification of the corpus.

On 09.03.2018 Leave to Appeal was granted on questions of law referred to in sub paragraphs (iii), (iv) and (v) in paragraph 17 of the petition dated 23.11.2016, which are as follows;

(iii) Whether their Lordship the High Court Judges of Civil Appeal had misdirected themselves by deciding the said Bantis acquired prescriptive title to the subject matter as against the rest of the co-owners?

(iv) Whether their Lordship the High Court Judges of Civil Appeal had erred in law by failing to appreciate the fact that the 1,2, and 8A respondents have not placed any cogent evidence to establish act of ouster which enables the said Bantis to claim prescriptive title against the fellow co-owners?

(v) Whether their Lordship the High Court Judges of Civil Appeal had failed to appreciate the fact that in the absence of evidence to establish act of ouster the co-owner cannot seek prescriptive title against the other co-owners merely relying on exclusive possession?

At the outset the Counsel for the relevant Defendants submitted that the High Court had correctly found that the Plaintiff had not proved title to the corpus and as such no question of co-ownership arises. The observation made by the High Court was that based on the evidence before it, the relevant Defendants have proved title independent of the Plaintiff. It is argued that since there is no question of law raised with regard to the finding that the Plaintiff was not a co-owner, the other questions of law cannot arise.

However, on the perusal of the questions of law for which leave had been granted, it cannot be denied that the appeal is based on the assumption that the parties are co-owners and that the Plaintiff has impliedly contested the finding that the relevant Defendants have proved title independent to the Plaintiff.

In fact, the parties have based their submissions on the issue of whether they, co-owners of the land sought to be partitioned and whether the 8th Respondent, Bantis, acquired prescriptive title to the subject matter as against the rest of the co-owners. Therefore, the contesting point made on behalf of the relevant Defendants regarding the futility of the questions of law raised in this appeal cannot stand.

Co-ownership

The relevant Defendants submit that in order for a question of prescription against co-owners to arise, it must be established that the Plaintiff is a co-owner. It is argued that the Counsel for the Plaintiff did not point to any evidence that the Plaintiff is a

co-owner of the corpus while the relevant Defendants have proved title independently of the Plaintiff on the basis of a deed from the year 1894 which is the oldest source deed provided in evidence.

The relevant Defendants have based their title to the corpus on Deed No. 12571 dated 13th March 1894 (marked 1V1) and seven other deeds (1V2-1V8) which convey the rights acquired by '1V1'.

The 1st /8A Defendant stated in evidence that the original owner of the corpus one Mathes alias Jando transferred **an undivided 1/8th share** of the corpus to one Sinnachcho. On Sinnachcho's death her rights devolved on her five children, Juanis, Carolina, Jamis, Ranso and Babunhamy. All five children by individual deeds sold their shares to Lankapurage Rosinahami, the 8A Defendant who was added as a party on the death of her spouse the 8th Defendant and is the mother of the present appeal's 1st /8A and 2nd Defendants [present Appellants].

Accordingly, Juanis and Carolina by Deed No. 13114 dated 2nd July 1974 (marked 1V2), Jamis by Deed No. 3053 dated 13th November 1974 (1V3) and Ranso by Deed No. 3004 dated 19th July 1974 (1V4), transferred their shares to the 8A Defendant. Babunhamy transferred her share to her sibling Jamis by Deed No. 6528 dated 31st May 1952 (1V5) which the said Jamis transferred to the 8A Defendant [Rosinahamy] by Deed No. 8780 dated 19th August 1958 (1V6).

In the statement of claim, it is mentioned that Rosinahamy, the 8A Defendant gifted her rights to the corpus to her two children the 1st/8A Defendant Albert by Deed No. 22170 dated 4th May 1985 (1V8), and the 2nd Defendant Chitralatha by Deed No. 22171 dated 4th May 1985 (2V1). It is submitted that they have accordingly proved title under Deed No. 12571 independently from the Plaintiff.

The primary deed on which the Plaintiff has based her claim to the corpus is deed No. 12572. According to the pedigree disclosed by the Plantiff **an undivided 1/3** share of the corpus was transferred by the said original owner Mathes by Deed No. 12572 dated 13th March 1894 to one Saudiris who had conveyed the same share by Deed No. 15144 dated 22nd January 1940 (marked as P2) to one Ransohamy, the Plaintiff's mother. The rights of Ransohamy had on her death devolved on her six children, namely, the Plaintiff, the 3rd to 5th Defendants, Karunawathie and Sisilawathie. The

rights of Karunawathie devolved on her siblings, while the rights of Sisilawathie had on her death passed onto her husband the 6th Defendant.

The Plaintiff in lieu of deed No. 12572 produced 'P1', a Letter issued by the Land Registry stating that the deed has perished. The document marked 'P1' does not contain any description of what the deed contained and all evidence led as to its contents were from the Plaintiff herself.

Thus, the relevant Defendants assert that there is no valid primary or secondary evidence led with regard to this deed and the extent transferred to the Plaintiff's predecessors. In order to substantiate this argument, the relevant Defendants have highlighted the admission made by the Plaintiff when being cross-examined that she did not know the contents of the deed nor the extent of rights transferred from the original owner Mathes to her predecessor Saudiris (vide page 160-161 of the Brief) as well as the Plaintiff's observation that the size of the land in deed No. 12752 was larger than the size of the land in deed No. 15144 and deed No. 12751.

On this basis the relevant Defendants take up the position that the Plaintiff has not sufficiently proved that she has title over the corpus and therefore has no basis to claim co-ownership.

The Plaintiff asserts the fact that the parties to the action are co-owners of the property sought to be partitioned by indicating that during cross-examination the 1st/8A Defendant specifically admitted the title of the Plaintiff to the corpus as set out in the pedigree (vide page 261 of the Brief). Furthermore, the Plaintiff notes that in the relevant Defendants statement of claim dated 31st January 1997, they claim rights under another individual, one Theberis and admit the fact that Theberis too had undivided rights to the corpus, which indicates that even the portion of land to which they claim prescriptive title is undivided. Therefore, on behalf of the Plaintiff it is argued that the relevant Defendants have conceded the co-owned rights of the parties to the land sought to be partitioned.

In this instance it is noteworthy that when being cross-examined, 1st/ 8A Defendants did admit to the fact that he is a co-owner to the corpus (vide page 255 of the Brief). The 1st/8A Defendants also admitted that Saudiris received rights under deed No. 12571 and that the Plaintiff received rights devolving from the original owner Mathes (at page 262 of the Brief).

The 1st /8A Defendants also accepted that by deed No. 15144 Saudiris transferred rights to Ransohamy which then devolved on her six children including the Plaintiff. The argument made in that instance was that the Plaintiff was not entitled to the land as those rights were never exercised by the Plaintiff nor her predecessor Ransohamy (at page 264 of the Brief). Furthermore the 1st /8A and 2nd Defendants had in their statement of claim dated 31st January 1997 in paragraph 23 stated that the two deeds Nos. 12572 and 15144 referred to above on which the Plaintiff's mother had acquired rights had never been acted upon. As such the relevant Defendants have not denied the two deeds and only state that they had not been acted upon.

Despite the fact that deed No. 12571 was not produced as evidence due to its unavailability, deed No. 15144 (marked 'P2') by which Saudiris conveys his rights to the corpus, to the Plaintiff's mother Rensohamy, describes deed No. 12571. The validity of deed No. 15144 which is a legally executed document cannot be denied. Therefore, the devolution of title as set out by the Plaintiff cannot be disregarded and the inference that can be drawn is that Saudiris had gifted the undivided rights he received with respect to the corpus, under deed No. 12751 to Rensohamy by way of deed No. 15144.

Prescriptive title

The Plaintiff's pedigree is based on three deeds, deeds No. 12571, 12572, 12573 all dated 13th March 1894.

According to the Plaintiff, the original owner also conveyed an undivided 13/24 share of the corpus to one Theberis by Deed No. 12573 dated 13th March 1894. This deed has not been produced and instead a letter issued by the Land Registry indicating that it has been decayed was submitted as evidence (marked 7V1).

As per the Plaintiff's pedigree, Theberis had then by Deed No. 13705 dated 24th February 1919 (7V2) sold a 15/48 share to Lankapurage Juanis who then conveyed this share to Hikkaduwage Ijo under Deed No. 10328 dated 4th July 1919 (7V3). The said Ijo was married to Theberis and together they had an undivided 13/24 share. They had 6 children, the 7th Defendant Francina, the 8th Defendant Bantis, Siyadoris, Sampy, Aminona, and Danister and on their deaths their rights devolved on their six heirs. The shares of Sampy, Aminona, and Danister who died unmarried and issueless devolved on Siyadoris and the 7th and 8th Defendants. Siyadoris by Deed No. 12881

dated 13th November 1972 (1V7) conveyed his share to the 8A Defendant Lankapurage Rosinahami.

The relevant Defendants in their statement of claim assert that although Theberis and Ijo had a 26/48 share (13/24 in the Plaint), they possessed a 42/48 share of the corpus and acquired prescriptive title to it. They further assert that on the death of Theberis and Ijo their rights were only enjoyed by one of their children, the 8th Defendant Bantis and that Bantis had prior to the institution of this action enjoyed undisturbed, uninterrupted and adverse possession of that undivided 42/48 share for more than 10 years thus acquiring prescriptive title. Accordingly on the death of the 8th Defendant it is argued that this share should devolve on his heirs, his widow Rosinahami (8A Defendant), and his children the 1st/ 8A Defendant and 2nd Defendant.

The relevant Defendants in their statement of claim assert that although Theberis and Ijo had a 26/48 share (13/24 in the Plaint), they possessed a 42/48 share of the corpus and acquired prescriptive title to it. They further assert that on the death of Thebris and Ijo their rights were only enjoyed by one of their children, the 8th Defendant Bantis and that Bantis had prior to the institution of this action enjoyed undisturbed, uninterrupted, and adverse possession of that undivided 42/48 share for more than 10 years thus acquiring prescriptive title. Accordingly on the death of the 8th Defendant it is argued that this share should devolve on his heirs, his widow Rosinahami (8A Defendant), and his children the 1st/8A Defendant and 2nd Defendant.

Based on the rights acquired under Sinnachcho and Theberis the relevant Defendants have claimed that the 1st/8A Defendant and 2nd Defendant are each entitled to a 3/48 share of the corpus while the 8A Defendant (now deceased) is entitled to a 42/48 share of the corpus (vide paragraph 21 of the statement of claim marked 'P5').

In light of this claim, the three questions of law above, namely (1) whether the Judges of the High Court of Civil Appeal had misdirected themselves by deciding the said Bantis acquired prescriptive title to the subject matter, (2) had failed to appreciate that in the absence of evidence to establish act of ouster the co-owner cannot seek prescriptive title against the other co-owners merely relying on exclusive possession, and (3) that the 1, 2, and 8A Defendants have not placed any cogent evidence to

establish act of ouster which enables the said Bantis to claim prescriptive title against the fellow co-owners, can be addressed in toto.

It is the Plaintiff's contention that the relevant Defendants have only established possession of the property and have failed to establish any overt act of ouster and have therefore failed to prove that Bantis (8th Defendant) acquired prescriptive title to a 42/48 share of the corpus. It is further submitted that the High Court has failed to establish an act of ouster and has solely decided the matter based on the purported exclusive possession claimed by the relevant Defendants.

The relevant Defendants' position is that this is clearly a case in which the counter-presumption of ouster applies and that based on the evidence placed before court they have sufficiently proved that they have prescriptive rights over the corpus.

The fundamental principle recognized by our law is that the possession of one co-owner is the possession of the other co-owners as well. In light of this principle, it is pertinent to touch upon the law of prescription in relation to co-owners.

Our Prescription Ordinance is said to constitute a complete code on the subject of prescription. As per Section 3 of the Prescription Ordinance, No. 22 of 1871 as amended, in order to establish prescriptive title, there must be, "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 or plaintiff in such action…"

According to the leading case of ***Corea v. Appuhamy*** **(1911) 15 NLR 65**, in which Their Lordships of the Privy Council discussed the principles relating to prescription among co-owners;

"*It is settled law that a co-owner's possession is in law the possession of all 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 an ouster or something equivalent to ouster could bring about that result.*"

This means that a co-owner cannot prescribe against other co-owners unless he has actually ousted them or has by some overt act intimated to them that he is no longer possessing on their behalf but is possessing adversely to them. Thus, the co-owner

claiming prescriptive possession ***must prove that there has been an act of ouster prior to the running of prescription***.

In light of this section, the question that arises with respect to exclusive possession of the common property by one co-owner for a long period of time is whether such possession was 'adverse' and if so at what point it became so.

In ***Tillekeratne v. Bastian*** **(1918) 21 NLR 12** at p. 18, Bertram C.J. examining the real effect of the decision in ***Corea v. Appuhamy*** (supra) upon the interpretation of the word "adverse" in Section 3 of the Prescription Ordinance with reference to cases of co-ownership, observed that the word must be interpreted in light of 3 principles of law;

"(*i) 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.*

(ii) 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.

(iii) A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity."

In the context of co-owners, this means that generally a co-owner cannot establish prescriptive title against other co-owners. Thus, whenever a co-owner whose possession of the common property was not at its inception adverse, later claims that it has become adverse, the onus is on him to prove it. He must not only prove an intention on his part to possess adversely, but a manifestation of that intention to the other co-owners against whom he sets up his possession. Therefore, he must prove an "overt unequivocal act" of ouster.

However, in ***Tillekeratne v. Bastian*** (supra) at p. 20 it was also observed that if these presumptions of law are accepted without qualification it could lead to a conclusion that is artificial and contrary to common sense;

"*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 reasonable memory reaches;*** *that he and they have done* ***nothing to recognize the claims of the other co-***

owners; that he and they **have taken the whole produce of the property for themselves;** *and that these co-owners* **have never done anything to assert a claim to any share of the produce,** *it is artificial in the highest degree to say that person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession.*" (Emphasis added)

In cases where principles of law would lead to such an artificial result the law has developed a counter- presumption, that is to say a "presumption of ouster". In ***Tillekeratne v. Bastian*** (supra) Bertram C.J. succinctly stated the principle as follows;

"it is a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought."

Further the Court held at p. 23

"*it is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse.*"

In ***Angela Fernando v. Devadeepthi Fernando and Others***, **(2006) 2 Sri L.R 188** Weerasuriya J., observed that;

"*Ouster does not necessarily involve the actual application of force. The presumption of ouster is drawn in certain circumstances when exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past there was in fact a denial of the rights of the other co-owners.*"

Thus, the presumption of ouster is an exception to the general rule which can be invoked when there are special circumstances in addition to the fact of undisturbed and uninterrupted possession for the requisite period of 10 years.

In support of the contention that the presumption of ouster would apply to present case, the following reasons were expounded on behalf of the relevant Defendants;

1) Long and continuous possession;

The relevant Defendants submit that the 8th Defendant, his parents and his family, have been in possession of the land for a long period of time and that there is no evidence of anyone else having ever possessed the land (vide page 212 of the Brief).

The 1st / 8A Defendant giving evidence stated that his family took up residence on the land sought to be partitioned in 1947. However, he stated that he was residing in Ja-ela during the time of the trial and that his daughter was residing on the land. He further stated that his mother Rosinahami, the 8A Defendant had resided on the land from 1947 until her death in 2002.

The Plaintiff giving evidence on 25th March 2002 admitted that she moved to the area in which the land is situated 40 years ago but gave no evidence of having made any claims to the land at that time. The Plaintiff also admitted that the corpus was the ancestral property of the 8th Defendant and that apart the family of the 8th Defendant no one else resided on the land (at page 154 of the Brief). In fact, the Plaintiff led no evidence to show that her ancestors possessed the land.

The Plaintiff denying the exclusive possession of the corpus by the 1st /8A and 2nd Defendants and their predecessors, claimed that her predecessors in title namely Rensohami and Saudiris exercised their rights to the land and that Rensohami had plucked fruits from the land. She further claimed that they were not allowed to enter the land after the action was filed.

Furthermore, the relevant Defendants state that the paddy field and owita portion depicted as Lot A2 and B in Plan Y1 were excluded from the corpus by both the District Court and High Court on the ground that they had been exclusively possessed by the 1st/8A and 2nd Defendant and their predecessors in title, consequently acquiring prescriptive title thereto. It is argued that from a logical perspective those who cultivated the paddy and owita portion would have naturally first resided on the highland and then begun such cultivation.

With respect to Lots A2 and B in Plan Y1 called "Rathmehera Delgahawatte Owita saha Kumbura" the 1st/8A Defendant claimed that his father the 8th Defendant cultivated the land with paddy and vegetables and was in possession of it till his death at the age of 90 in 1992. The 1st /8A Defendant also claimed that on his father's death,

he came into possession of that portion of land and after having left the area to take up residence in Katunayake, he came to inspect that portion at least once a month. It is argued that the paddy and owita portion was a necessary adjunct of the highland portion and the fact that they were excluded from the corpus further established the fact that unless the 1st/8A and 2nd Defendants and their predecessors exclusively possessed the highland as their ancestral property they could not have acquired prescriptive title to the paddy and owita portion (Lots A2 and B of Plan Y1). Thus, the relevant Defendants argue that their long, continuous possession of the corpus has been established.

2) No claim to the improvements and plantations;

Apart from the relevant Defendants, neither the Plaintiff nor the other Defendants had any claim to the improvements and plantations on the corpus.

According to the Surveyor's Reports marked X1 and Y3, Lot A1 consists of a house marked No.01, a kitchen marked No. 02, a latrine marked No.3, and two wells marked No. 4 and No. 5 which were all exclusively claimed by the 1st/8A Defendant without any dispute.

The Plaintiff had only claimed that the plantations which are older the 75 years and that too was not for herself but as belonging the soil. The relevant Defendants argue that the inference that can be drawn from the fact that the Plaintiff makes no claim with respect to the plantations which are less than 75 years is that neither she nor her predecessors in title have been in possession of the corpus for that long.

The District Court categorically rejected the Plaintiff's claim to the plantations and held that all the improvements and plantations on the corpus A1 belonged to the 1st/8A and 8th Defendants based on the evidence that they were located on the land (A1) which the 8th Defendant and his family possessed, resided on and cultivated for an extended duration of time. It is also noteworthy that this finding was not appealed against by the Plaintiff or the other Defendants to the High Court. Thus, having made no claims to any cultivation on the land for least 75 years, it is argued that it is hugely artificial for the Plaintiff to claim that the relevant Defendants had been in possession of the land in the capacity of co-owners.

3) Payment of assessment rates

The relevant Defendants have proved with documentary evidence that the 1st/8A and 8th Defendants have paid assessment rates over the property since 1961 (at page 217-220 of Brief) (1v9-1v41 at pages 411-447). The Galle Municipal Council has charged municipal council rates in respect of the premises of No. 65 (old)/No. 63 (new) Pagngnaloka Mawatha, Welipitmodara, Ginthota. Thus, the relevant Defendants argue that the Municipal council had recognized that the 1st /8A Defendant and his father the 8th Defendant were in exclusive occupation of the highland portion on which their ancestral house stood and the entire premises was assigned a number with reference to the road that ran on the South-Eastern boundary of the corpus. It is submitted that it would be highly artificial to hold that these relevant Defendants alone have paid assessment rates to the Municipal Council for such a long period of time while possessing the land in the capacity of co-owners.

As was reiterated earlier, the settled law is that the possession of one co-owner is in law the possession of the other co-owners. Therefore, the question that arises in this case is whether from the uninterrupted sole possession of the 8th Defendant and his predecessors in title, extending over a number of years and the conduct of the other co-owners in not asserting any right to possess, a presumption of ouster by the 8th Defendant and his predecessors can be invoked and the commencement of adverse possession by them can be presumed.

Whether the presumption of ouster is to be drawn or not would depend on the circumstances of the case. It was held in ***Abdul Majeed v. Ummu Zaneera*** **61 NLR 361 at page 381,**

"that proof of such additional circumstances has been regarded in our courts as a sine qua non where a co-owner sought to invoke the presumption of ouster."

On the perusal of the evidence submitted on behalf of the relevant Defendants it appears that their claim is fundamentally based on the assertion that they as well as their predecessors in title were the only individuals who had undisturbed, uninterrupted possession of the property and that too since the execution of the source deeds by the original owner Mathes alias Jando in 1894.

The High Court based its finding that the relevant Defendants had acquired prescriptive title to the corpus on the same arguments made on behalf of the relevant Defendants in this appeal. While holding that the Plaintiff had failed to establish title to the corpus and was therefore not a co-owner, the Court observed that in any event the 1st/8A, 2nd and 8th Defendants had acquired prescriptive title to the corpus on the basis that they had sole, exclusive possession of the corpus, they owned all the plantations and improvements on the corpus, they had paid the assessment rates and also due to the inference that they could only have acquired prescriptive title to Lots A2 and B if and only if their forefathers had exclusively possessed Lot A1 prior to that.

Whether these circumstances are of a compelling character to support a finding as to ouster must be weighed against the arguments made on behalf of the Plaintiff.

It is the contention of the Plaintiff that the relevant Defendants conceded the co-ownership of the property. It is argued that the rights of Theberis and Ijo, the parents of the 8th Defendant did not devolve on the 8th Defendant alone but also on his 5 siblings namely, Francina the 7th Defendant, Siyadoris, Sampy, Aminona and Danister. According to the Appellant, Sampy, Aminona and Danister's rights devolved on their deaths to Siyadoris, Francina (7th Defendant) and Bantis (8th Defendant).

In order to bring into question, the claim that the rights of Theberis and Ijo devolved only on the 8th Defendant, the Plaintiff makes reference to Deed No. 12881 (1V7) and Deed No. 22170 dated 4th May 1985 (1V8). In the deed marked 1V8, a deed of gift Rosinahamy executed in favour 1st Defendant Aluthgamage Albert, it is stated that she was transferring rights she had received from Siyadoris under deed No. 12881 (1V7) which the 1st/8A Defendant admitted to during cross-examination (at page 249).

Furthermore the 1st /8A Defendant admitted that his mother Rosinahami received rights under the deed marked '1V7' from a child of Theberis (pages 252-253 of the Brief) and when asked whether that meant Theberis' rights went to his children the 1st /8A Defendant stated that these children never possessed the land, that they had a claim but asked for money and that those rights were purchased by Rosinahami.

The Plaintiff has made reference to this chain of devolution in order to claim that the 7th Defendant thus had rights to the corpus and to prove that the 8th Defendant was not the sole recipient of the share of Theberis and Ijo. However, the relevant

Defendants argue that this submission holds no weight as the 7th Defendant has not disputed against the Judgment of the High Court and had not made any claim to any of the improvements or plantations on the corpus.

The Plaintiff also argue that as evidenced by Deeds marked '1V2' dated 2nd July 1974 and '1V8' dated 4th May 1984, which is a century after 1894, the relevant Defendants have acted conceding the co-ownership of the parties.

Based on the evidence submitted to court, there can be no doubt that the 8th Defendant and his family had been in exclusive possession of Lot A1 in Plan Y1. As stated by the Plaintiff, she had never resided on the land but had resided in an area close to the land. The inference that can be drawn from this admission is that she must have been aware of the fact that the relevant Defendants were residing on the corpus, had constructed buildings and cultivated the land. It was even claimed by the Plaintiff that the highland was the ancestral land of the 8th Defendant. Such an admission would weigh heavily in favour of the assertion that the relevant Defendants were possessing the land as if they were the sole owners of it. Furthermore, on perusal of the caption to the plaint it appears that the Sri Pagngnaloka Mawatha Welipitmodara, Ginthota address has only been assigned to the 1st, 2nd and 8 and 8A Defendants and every other Defendant and the Plaintiff have not used this address.

In ***Mailvaganam v. Kandaiya*** **(1915) 1 C.W.R. 175** de Samapayo J stated;

"*There is no physical disturbance of possession necessary. It is sufficient if one co-owner has, to the knowledge of the others, taken the land for himself and begun to possess it as his own exclusively. This sole possession is often attributable to an express or tacit division of family property among co-owners, and the adverse character of exclusive possession may be inferred from circumstances.*"

The claim made by the relevant Defendants is that their predecessor the 8th Defendant had acquired prescriptive title to an undivided 42/48 share of the corpus. Theberis and Ijo had been entitled to a 26/48 undivided share of the property but according to the relevant Defendants they had been in possession of a 42/48 share of it which the 1st /8A Defendant failed to provide a proper explanation for.

Although long continued possession can be established it is necessary to take into consideration the circumstances that are quite distinct from the mere duration of

possession which would warrant the application of the presumption of ouster. Evidence indicates that Lot A1 with its improvements and plantations was maintained as the place of residence of the 8th Defendant and his family. However, it is difficult to identify specific facts from which one could legitimately infer a change in the nature of the possessor's intention with regard to the holding of the land as in order to establish prescriptive title, the circumstances must indicate that separate and exclusive possession had become adverse at some date more than ten years before the bringing of the action.

The fact that the plantations on the corpus were held to be exclusively owned by the relevant Defendants does not substantiate the assertion that they were not in possession of the corpus as co-owners. Our authorities show that where a plantation has been made by a co-owner on the common land with the express or implied consent of the other co-owners, the co-owner making the plantation is entitled to possess the whole of the plantation until the rights of the parties are finally determined in a partition action (***Arnolis Singho v. Mary Nona*** **(1946) 47 NLR 564,** ***Peeris v. Appuhamy*** **(1947) 48 NLR 344**). There is no evidence indicating an objection on the part of the other co-owners to the cultivation of the common property and in fact during the survey of the land it was noted that the Plaintiff's claim that several plantations belonged to the soil was not on the basis that they were made without their consent but on the ground that they were made by their predecessors. Furthermore, it is settled law that a co-owner who makes a plantation is entitled exclusively to the fruits of it. This was observed in the case of ***Podi Sinno v. Alwis*** **(1926) 28 NLR 401** where it was held that,

"*It is the invariable custom of the country for every co-owner who effects improvements in the way of permanent plantations on a common land alone to possess such plantation and the fruits of such plantations.*"

Therefore, taking into consideration the general rights of co-owners to cultivate a co-owned land it is difficult to draw an inference that the relevant Defendants' ownership of the plantations is necessarily an attribute of the sole ownership of the corpus. Furthermore, the payment of assessment rates by a co-owner in possession is not an act unexpected of a co-owner and cannot be considered as a factor that would prove adverse possession.

Therefore, based on the evidence adduced by the relevant Defendants it cannot be said that there is proof of circumstances from which a reasonable inference could be drawn that such possession had become adverse at some date ten years before the action was brought and would justify the Court in presuming an ouster. Thus, the questions of law can be answered in the affirmative.

Conclusion

In view of the aforementioned reasons, I answer the questions of law as follows;

(iii) Whether their Lordship the High Court Judges of Civil Appeal had misdirected themselves by deciding the said Bantis acquired prescriptive title to the subject matter as against the rest of the co-owners?

Yes

(iv) Whether their Lordship the High Court Judges of Civil Appeal had erred in law by failing to appreciate the fact that the 1,2, and 8A respondents have not placed any cogent evidence to establish act of ouster which enables the said Bantis to claim prescriptive title against the fellow co-owners?

Yes

(v) Whether their Lordship the High Court Judges of Civil Appeal had failed to appreciate the fact that in the absence of evidence to establish act of ouster the co-owner cannot seek prescriptive title against the other co-owners merely relying on exclusive possession?

Yes

Accordingly, the judgement of the High Court of Civil Appeals dated 13.10.2016 is hereby set-aside and the judgement of the District Court dated 2nd April 2009 is affirmed

The appellant is entitled for costs of this appeal

Appeal allowed

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Murdu N.B. Fernando, P.C., J

I agree.

JUDGE OF THE SUPREME COURT