

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

In the matter of an application for Leave to Appeal in terms of Section 5 (c) (1) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006.

Manchanayake Arachchilage Dharmawathie,
Doranagoda, Udugampola.

S.C. Appeal No. 151/2015
SC/HCCA/LA NO. 565/2014
WP/HCCA/GMP/209/2002(F)
D.C. Gampaha Case No. 27302/P

Plaintiff

Vs.

1. Keppetiwalana Ralalage Rohini Lanka
2. Keppetiwalana Ralalage Shayamalie
Dharmadasa
3. Keppetiwalana Ralalage Lakshman
Dharmadasa
4. Keppetiwalana Ralalage Sisira Kumara
Dharmadasa
5. Keppetiwalana Ralalage Dharmapriya
6. Keppetiwalana Ralalage Kapila Nimal Ruwan
7. Keppetiwalana Ralalage Malanie
Pushpakanthi
8. Keppetiwalana Ralalage Jayaratna
9. Thalahitiya Gamaralalage Podihamine

All of Doranagoda, Udugampola.

Defendants

AND

1. Keppetiwala Ralalage Rohini Lanka
2. Keppetiwala Ralalage Shayamalie Dharmadasa
3. Keppetiwala Ralalage Lakshman Dharmadasa
4. Keppetiwala Ralalage Sisira Kumara Dharmadasa
9. Thalahitiya Gamaralalage Podihamine

All of Doranagoda, Udugampola.

1st to 4th and 9th Defendant-Appellants

Vs.

Manchanayake Arachchilage Dharmawathie,
Doranagoda, Udugampola.

Plaintiff- Respondent

5. Keppetiwala Ralalage Dharmapriya
6. Keppetiwala Ralalage Kapila Nimal Ruwan
7. Keppetiwala Ralalage Malanie Pushpakanthi
8. Keppetiwala Ralalage Jayaratna

All of Doranagoda, Udugampola.

5th to 8th Defendant-Respondents

AND NOW BETWEEN

1. Keppetiwala Ralalage Rohini Lanka

2. Keppetiwala Ralalage Shayamalie Dharmadasa
3. Keppetiwala Ralalage Lakshman Dharmadasa
4. Keppetiwala Ralalage Sisira Kumara Dharmadasa
9. Thalahitiya Gamaralalage Podihamine (Deceased)

- 9(a) Keppetiwala Ralalage Rohini Lanka
- 9(b) Keppetiwala Ralalage Shayamalie Dharmadasa
- 9(c) Keppetiwala Ralalage Lakshman Dharmadasa
- 9(d) Keppetiwala Ralalage Sisira Kumara Dharmadasa

All of Doranagoda, Udugampola

1st to 4th and 9th Defendant-Appellant-Appellants

Vs.

Manchanayake Arachchilage Dharmawathie,
Doranagoda, Udugampola. (Deceased)

- 1(a) Keppetiwala Ralalage Dharmapriya
- 1(b) Keppetiwala Ralalage Kapila Nimal Ruwan
- 1(c) Keppetiwala Ralalage Malanie Pushpakanthi

Plaintiff- Respondent-Respondents

5. Keppetiwala Ralalage Dharmapriya
6. Keppetiwala Ralalage Kapila Nimal Ruwan

7. Keppetiwalana Ralalage Malanie
Pushpakanthi
8. Keppetiwalana Ralalage Jayaratna
(Deceased)

- 8(a) Keppetiwalana Ralalage Nandani Hemalatha
- 8(b) Keppetiwalana Ralalage Jagath Rohana
- 8(c) Keppetiwalana Ralalage Thamara Dharshani
- 8(d) Keppetiwalana Ralalage Ajith Priyantha
- 8(e) Keppetiwalana Ralalage Geetha Gayani

All of Doranagoda, Udugampola

**5th to 8(a) to (e) Defendant-Respondent-
Respondents**

**Before: Buwaneka Aluwihare, P.C., J.
K.K. Wickremasinghe, J.
Janak De Silva, J.**

Counsel:

Ranjan Suwandarathne, PC with Anil Rajakaruna for the 1st to 4th and 9th Defendant-Appellant-Appellants

Sudharshani Cooray for the Substituted Plaintiff-Respondent-Respondent and 5th to 8(a) to 8(e) Defendant-Respondent-Respondents

Written Submissions tendered on:

29.10.2015 and 19.01.2023 by the 1st to 4th and 9th Defendant-Appellant-Appellants

03.05.2016 and 04.01.2023 by for the Substituted Plaintiff-Respondent-Respondent and 5th to 8(a), 8(b) and 8(c) Defendant-Respondent-Respondents

Argued on: 02.12.2022

Decided on: 10.08.2023

Janak De Silva J.

This appeal arises out of a partition action. There is no dispute as to the identity of the corpus. On the title dispute there was some common ground between Plaintiff-Respondent-Respondent (Plaintiff) and the 1st to 4th and 9th Defendant-Appellant-Appellants (Appellants).

According to them the original owner of the corpus was Keppetiwalana Ralalage Pabilis Appuhamy. It was also admitted that Pabilis Appuhamy by Deed of Transfer No. 29739 dated 14.05.1933 transferred the corpus in equal undivided shares to one Manchanayake Arachchilage Jamis Appuhamy and one Manchanayake Arachchige Podisingho. The title dispute between the Plaintiff and Appellants was on the devolution of title from the said Manchanayake Arachchilage Jamis Appuhamy and said Manchanayake Arachchige Podisingho.

According to the Plaintiff, Jamis Appuhamy by Deed of Transfer No. 275 dated 23.06.1939 (18.1) transferred his undivided $\frac{1}{2}$ share of the corpus back to Pabilis Appuhamy. Thereafter Pabilis Appuhamy by Deed of Transfer No. 17754 dated 17.11.1971 (18.2) transferred this undivided $\frac{1}{2}$ share of the corpus to his grandchildren, the 1st to 4th Appellants. They are the children of the 9th Appellant and Keppetiwalana Ralalage Wijedasa, a son of Pabilis Appuhamy. Thus, according to the Plaintiff each of the 1st to 4th Appellants became entitled to an undivided $\frac{1}{8}$ th share of the corpus. Nevertheless, the Appellants contend that Keppetiwalana Ralalage Dharmadasa, another son of Pabilis Appuhamy has prescribed to the entire corpus through long and undisturbed possession adverse to the other co-owners.

The title dispute between the Plaintiff and the Appellants on one side and the 5th to 8(a), 8(b) and 8(c) Defendant-Respondent-Respondents (Respondents) on the other side revolved on whether Pabilis Appuhamy was the only son of Keppetiwalana Ralalage Akalis Appuhamy. According to the Plaintiff and the Appellants, Pabilis Appuhamy was the sole son of Akalis Appuhamy and inherited the corpus from Akalis Appuhamy. Nonetheless, according to the Respondents, Akalis Appuhamy had another son called Keppetiwalana Ralalage Juwanis Appuhamy. Hence, Pabilis Appuhamy and Juwanis Appuhamy each inherited an undivided $\frac{1}{2}$ share of the corpus from Akalis Appuhamy.

The learned Additional District Judge accepted the pedigree claimed by the 8th Respondent and rendered judgment accordingly. The Appellants' prescriptive claim was denied. The appeal to the Civil Appellate High Court of the Western Province (holden in Gampaha) by the Appellants was dismissed.

Leave to appeal has been granted on the following questions of law:

1. Have the Hon. High Court Judges as well as the District Judge erred in law by basing the judgment on the purported pedigree of the 8th Defendant-Respondent-Respondent which has not been proved at all during the course of the trial on the contrary the 8th Defendant-Respondent-Respondent contradicted himself with regard to the purported original ownership relied upon by him in arriving at his said conclusion?
2. Have the Hon. High Court Judges as well as the learned District Judge erred in law by granting an undivided half share of the property whereas the 8th Defendant-Respondent-Respondent by the Statement of Claim dated 04.09.1986 in fact only sought to obtain undivided $\frac{1}{6}$ th of the said property in arriving at their final conclusion?

3. The Hon. High Court Judges as well as the learned District Judge totally failed to consider the prescriptive possession of these Petitioners backed by their title deeds in arriving at their final conclusion?
4. Have the Hon. High Court Judges as well as the learned District Judge erred in law by failing to evaluate the evidence led by the parties at the trial with regard to the actual devolution of title of the property in a suit and prescriptive claims made by the Petitioners and also the other Respondents in arriving at their final conclusion?

Inheritance

The plaintiff claimed that Pabilis Appuhamy acquired the corpus through a long and undisturbed possession. This is the position taken up by the Appellants as well. Neither party has provided any evidence to support this position.

On the contrary there is evidence that Pabilis Appuhamy inherited an undivided share of the corpus from Akalis Appuhamy. Under cross-examination the Plaintiff admitted to being the daughter of Podisingho, a son of Pabilis Appuhamy. According to the Plaintiff, Pabilis Appuhamy by Deed of Transfer No. 29739 dated 14.05.1933 transferred the corpus in equal undivided shares to Manchanayake Arachchilage Jamis Appuhamy and Podisingho.

In ***Suhumaran v. Sathiyaseelan*** [S.C. Appeal No. 28/2017, S.C.M. 04.10.2021] I held that the probative value of the contents of a recital in a deed depends on the facts and circumstances of each case. Although it is mentioned in the proceedings that a photocopy of Deed of Transfer No. 29739 was produced marked as “පැ.1අ”, it cannot be found in the brief. Nevertheless, the Plaintiff was cross examined on the contents of “පැ.1අ” and she admitted that the recital therein states that Pabilis Appuhamy obtained title to the corpus through inheritance from his father Akalis Appuhamy and his mother Helena.

In the absence of the marked deed “පැ. 1අ” in the brief, I am of the view that there is no legal impediment to the Court considering the evidence on record given by the Plaintiff on the contents of the recital therein. Given the relationship between Podisingho and Pabilis Appuhamy, I have no hesitation in accepting this evidence of the facts and circumstances of the case.

The fact that Akalis Appuhamy died intestate is further corroborated by the recital in deed marked (“8වි.1”) wherein Helena states that she is transferring the rights, to another land, which she derived from marriage inheritance. Moreover, documents marked “8වි.2” and “8වි.3” (plaints of two partition actions instituted by the 8th Respondent in relation to partition of other property belonging to Akalis Appuhamy) establish the fact that Pabilis Appuhamy and Juwanis Appuhamy were sons of Akalis Appuhamy. In fact, the Plaintiff accepted under cross-examination that Juwanis Appuhamy was also entitled to his share of the corpus on the death of Akalis Appuhamy. Accordingly, I am of the view that the 8th Respondent has proved that both Pabilis Appuhamy and Juwanis Appuhamy inherited an undivided ½ share each of the corpus from Akalis Appuhamy.

The Appellants strenuously contended that no share of the corpus should be granted to the 8th Respondent as neither he nor his predecessors were ever in possession of the corpus. The short answer to this point is that a co-owner’s possession is in law the possession of all the other co-owners. Every co-owner is presumed to be in possession in his capacity as a co-owner.

Accordingly, I answer the first question of law in the negative.

The Appellants contend that nevertheless, the 8th Respondent failed to prove the devolution of title of Juwanis Appuhamy to him. In particular, it was contended that Juwanis Appuhamy had three children, namely Keppetiwalana Ralalage Jayaratne (8th Respondent), Keppetiwalana Ralalage Jayatilleke and Keppetiwalana Ralalage Helena.

Hence, if at all the 8th Respondent is only entitled to an undivided 1/6th share of the corpus. In fact, the 8th Respondent in his statement of claim only claimed an undivided 1/6th share of the corpus. However, the learned Additional District Judge granted the 8th Respondent an undivided ½ share of the corpus.

Admittedly notices were sent by the District Court to Keppetiwala Ralalage Jayatilleke and Keppetiwala Ralalage Helena. They did not come forward. Nevertheless, it is the bounden duty of the trial judge in a partition action to fully investigate the title to the corpus. The law does not permit him to allocate shares to a claimant merely because the other parties who are entitled to undivided shares do not make a claim in the partition action. In ***Ismail Lebbe v. Haniffa* (51 N.L.R. 299 at 301)** it was held that if no party is able to establish to the satisfaction of the Court that a co-owner is alive or, if he is dead, who his heirs are, his share would remain unallotted and the Court will proceed to enter a partition decree in respect of the remaining shares among other co-owners. In ***Yoosuf and Others v. Muttaliph* (13 C.L.Rec. 171)** it was held that where such a portion of the corpus is left unallotted, the title to this unallotted lot remains in the original co-owners and that title is in no respect affected by the partition decree. I am of the opinion that both the District Court and the High Court were mistaken in their decision to grant the 8th Respondent an undivided ½ share of the corpus. The 8th Respondent is only entitled to an undivided 1/6th share of the corpus.

Therefore, I answer question of law No. 2 in the affirmative.

Prescription

The 1st to 4th Appellants are the children of Keppetiwala Ralalage Dharmadasa, a son of Pabilis Appuhamy. The 9th Appellant is the widow of Keppetiwala Ralalage Dharmadasa. The Appellants claim that from around 1955 Keppetiwala Ralalage Dharmadasa was in undisturbed and uninterrupted possession of the entirety of the corpus in a manner that

was adverse to the rights of aforementioned Podisingho and all those who claim the title through him. Consequently, they claim to have obtained title to the corpus.

The 9th Appellant's testimony shows that she got married to Dharmadasa in 1954 and acquired possession of the corpus in 1955. Nevertheless, the evidence in this case indicates that the corpus was co-owned property by then.

In ***Tillekeratne v. Bastian* (21 N.L.R. 12)** it was held that in order to acquire prescriptive title a co-owner should prove exclusive possession for ten years after changing the nature of the possession to one of adverse title to the others.

Furthermore, the Appellants and the parties they claim prescriptive rights against are related. In ***De Silva v. Commissioner General of Inland Revenue* (80 N.L.R. 292 at 295-6)** Sharvananda J. (As he was then) held:

“The principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no hostility to or denial of the title of the true owner there can be no adverse possession. In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the animus of the person doing those acts, and this must be ascertained from the facts and circumstances of each case and the relationship of the parties. Possession which may be presumed to be adverse in the case of a stranger may not attract such a presumption, in the case of persons standing in certain social or legal relationships.”(Emphasis added)

Let me now examine the evidence presented by the Appellants against these principles.

The 9th Appellant's claim was that her husband Dharmadasa paid taxes for the corpus. This testimony has been corroborated by retired agrarian officer P.A.S. Sumanasiri. Nevertheless, in *Hassan v. Romanishamy* (66 C.L.W. 112) Basnayake C.J. held that the payment of rates is by itself not proof of possession for the purpose of section 3 of the Prescription Ordinance, for rates can be tendered by a tenant or one occupying any premises with the leave and license of the owner or by any other person. This statement was cited with approval in *Sirajudeen and Others v. Abbas* [(1994) 2 Sri. L. R. 365].

Gamaralalage Joseph Perera, a friend of Dharmadasa, testified that Dharmadasa and the Appellants resided in the house built on the corpus. However, he stated that he is unaware as to who enjoyed the produce of the corpus or whether anyone else was in possession of or could claim title to the corpus. Gunapala Jayawardane, who is related to the 9th Appellant, lived in the house built on the corpus with Dharmadasa and the 9th Appellant from 1955 to 1978. He testified that Dharmadasa and the 9th Appellant were the only ones who had possession of the corpus and were the only ones who cultivated the corpus. However, during cross-examination on behalf of the Plaintiff, he admitted that Wijedasa frequently visited the corpus until his death in 1980 and that he is unaware whether Wijedasa was given a portion of the produce from the corpus.

H.S.A.P. Peris, a Deputy Provincial Director of the Department of Agriculture was called to prove documents “8ඒ.12” to “8ඒ.15”. He testified that these documents were issued by the Department of Agriculture allowing Dharmadasa and the 9th Appellant to cultivate specific types of crops on a land called Ambagahalanda.

Nevertheless, as pointed out earlier, every co-owner is presumed to be possessing the corpus in his capacity as a co-owner. One co-owner cannot put an end to such possession by any secret intention in his mind. It is only "ouster" or something equivalent to "ouster" which could bring about that result. The evidence in this case does not establish any such

ouster. The ouster was established only in December 1983 when the Appellants obstructed the possession of the Plaintiff and her children. This partition action was filed by the Plaintiff in November 1984.

For all the foregoing reasons, I hold that the learned Additional District Judge and the Civil Appellate High Court judges were correct in rejecting the prescriptive claim of the Appellants for the whole corpus.

Accordingly, question of law Nos. 3 and 4 are answered in the negative.

Based on the answer given to the question of law No. 2, I vary the judgment of the learned Additional District Judge and allocate an undivided $1/6^{\text{th}}$ share of the corpus to the 8th Respondent. Another $2/6^{\text{th}}$ share of the corpus should be left unallotted.

The learned District Judge of Gampaha is directed to enter an interlocutory decree in accordance with this judgment. If the interlocutory decree has already been entered, it should be amended in accordance with the judgment of the Court.

The parties shall bear the costs of this appeal.

The appeal is partly allowed.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.

I agree.

Judge of the Supreme Court

K.K. Wickremasinghe, J.

I agree.

Judge of the Supreme Court