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

In the matter of an appeal after obtaining from the Supreme Court leave to appeal against the Judgment dated 03/08/2010 delivered by the High Court of the Sabaragamuwa Province in Appeal No: SP/HCCA/KAG/587/2008(F) DC Kegalle Case No: 23878

Vidanalage Dingiri Banda (Deceased), of Kurunegoda, Kotiyakumbura.

Plaintiff

Vithanalage Senathileke of Kurunegoda, Kotiyakumbura.

Substituted Plaintiff

S.C. Appeal No. 198/2012
SP/HCCA/KAG Case No. 587/2008(F)
D.C. Kegalle Case No. 23878/P

Vs.

1. Henaka Ralalage Punchi Banda alias Vijitha Bandara,
   Kurunegoda,
   Kotiyakumbura.

2. Henaka Ralalage Podi Appuhamy (Deceased),
   No. 29, Kurunegoda,
   Kotiyakumbura.

2A. Henaka Ralalage Wimalasiri Menike,
   No. D27, Kurunegoda,
   Kotiyakumbura.

3. V.P.C. Vitharana,
   No. D34, Kurunegoda,
   Kotiyakumbura.

4. Henaka Ralalage Somarathne,
   No. D33, Kurunegoda,
   Kotiyakumbura.

5. Henaka Ralalage Wijeratne (Deceased),
   No. D33/1, Kurunegoda,
   Kotiyakumbura.

5A. Henka Ralalage Sriyani Wijeratne,
   No. 400/1, Kadurugashena, Hiyare East,
   Hiyare, Galle.

6. Henaka Ralalage Dingiri Appuhamy
   (Deceased),
   Kurunegoda, Kotiyakumbura.

6A. Henaka Ralalage Piyarathne,
   Kurunegoda, Kotiyakumbura.

7. Henaka Ralalage Mohotti Appuhamy
   (Deceased),
   Kurunegoda, Kotiyakumbura.

7A. Henaka Ralalage Kamalawathie,
   No. D29, Kurunegoda,
   Kotiyakumbura.

8. Henaka Ralalage Gunathilake,
   Kurunegoda, Kotiyakumbura.

9. Henaka Ralalage Dingiri Appuhamy
   (Deceased),
   Kurunegoda, Kotiyakumbura.

9A. Henaka Ralalage Piyaratne,
Kurunegoda, Kotiyakumbura.

10. Ranasinghe Hettiarachchige Gunasekara,
Kurunegoda, Kotiyakumbura.

11. H.R. Podiralahamy (Deceased),
Kurunegoda, Kotiyakumbura.

11A. Henaka Ralalge Premadasa,
Kurunegoda, Kotiyakumbura.

12. Henaka Ralalage Piyaratne,
Kurunegoda, Kotiyakumbura.

13. Henaka Ralalge Wimalsiri Manike (legal representative of the 2nd Defendant deceased),
Kurunegoda, Kotiyakumbura.

14. P.R.Ranmenike,
Kurunegoda, Kotiyakumbura.

Defendants

AND

3. V.P.C. Vitharana,
No. D34, Kurunegoda,
Kotiyakumbura.

4. Henaka Ralalage Somarathne,
No. D33, Kurunegoda,
Kotiyakumbura.

5. Henaka Ralalage Wijeratne (Deceased),
No. D33/1, Kurunegoda,
Kotiyakumbura.

5A. Henka Ralalage Sriyani Wijeratne,
No. 400/1, Kadurugashena, Hiyare East,
Hiyare, Galle.

10. Ranasinghe Hettiarachchige Gunasekara,
Kurunegoda, Kotiyakumbura.

Defendant-Appellants

Vs.

Vidanalage Dingiri Banda (Deceased), of
Kurunegoda, Kotiyakumbura.

Plaintiff-Respondent

Vithanalage Senathileke of Kurunegoda,
Kotiyakumbura.

Substituted Plaintiff-Respondent

1. Henaka Ralalage Punchi Banda alias
Vijitha Bandara,
Kurunegoda, Kotiyakumbura.

2. Henaka Ralalage Podi Appuhamy
(Deceased),
No. 29, Kurunegoda,
Kotiyakumbura.

2A. Henaka Ralalage Wimalasiri Menike,
No. D27, Kurunegoda,
Kotiyakumbura.

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Kurunegoda, Kotiyakumbura.

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Gunathilake,Kurunegoda,
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9. Henaka Ralalage Dingiri Appuhamy
(Deceased),
Kurunegoda, Kotiyakumbura.

9A. Henaka Ralalage Piyaratne,
Kurunegoda, Kotiyakumbura.

11. H.R. Podiralahamy (Deceased),
Kurunegoda, Kotiyakumbura.

11A. Henaka Ralalge Premadasa,
Kurunegoda, Kotiyakumbura.

12. Henaka Ralalage Piyaratne,
Kurunegoda, Kotiyakumbura.

13. Henaka Ralalge Wimalsiri Manike (legal
representative of the 2nd Defendant
deceased),
Kurunegoda, Kotiyakumbura.

14. P.R.Ranmenike,
Kurunegoda, Kotiyakumbura.

Defendant-Respondents

AND NOW BETWEEN

3. V.P.C. Vitharana,
No. D34, Kurunegoda,
Kotiyakumbura.

10. Ranasinghe Hettiarachchige Gunasekara,
Kurunegoda, Kotiyakumbura.

Defendant-Appellant-Petitioners

Vs.

Vidanalage Dingiri Banda (Deceased), of
Kurunegoda, Kotiyakumbura.

Plaintiff-Respondent

Vithanalage Senathileke of Kurunegoda,
Kotiyakumbura.

Substituted Plaintiff-Respondent

1. Henaka Ralalage Punchi Banda alias
Vijitha Bandara,
Kurunegoda, Kotiyakumbura.

2. Henaka Ralalage Podi Appuhamy
(Deceased),
No. 29, Kurunegoda,
Kotiyakumbura.

2A. Henaka Ralalage Wimalasiri Menike,
No. D27, Kurunegoda,
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12. Henaka Ralalage Piyaratne,
    Kurunegoda, Kotiyakumbura.

13. Henaka Ralalge Wimalsiri Manike (legal representative of the 2nd Defendant deceased),
    Kurunegoda, Kotiyakumbura.

14. P.R.Ranmenike,
    Kurunegoda, Kotiyakumbura.

Defendant-Respondent-Respondents

4. Henaka Ralalage Somarathne,
   No. D33, Kurunegoda,
   Kotiyakumbura.

5. Henaka Ralalage Wijeratne (Deceased),
   No. D33/1, Kurunegoda,
   Kotiyakumbura.

5A. Henka Ralalage Sriyani Wijeratne,
    No. 400/1, Kadurugashena, Hiyare East,
    Hiyare, Galle.

Defendant-Appellant-Respondents

Before: **L.T.B. Dehideniya, J.**

Janak De Silva, J.

Achala Wengappuli, J.

Counsel:

Dr. F.A. Sunil Cooray with Nilanga Perera for the 3rd and 10th Defendants-Appellants-Appellants

Ranil Samarasooriya with Shashiranga Sooriyapatabendi for the Substituted Plaintiff-Respondent-Respondent

Niranjan De Silva with Isuri Jayawardena for the 1A Defendant-Respondent-Respondent

Tharanga Edirisinghe for the 2A and 13th Defendants-Respondents-Respondents

Written Submissions on :

28.03.2013 by the 3rd and 10th Defendants-Appellants-Appellants

06.05.2013 by the 1A Defendant-Respondent-Respondent

05.04.2017 and 16.03.2021 by the 2A and 13th Defendants-Respondents-Respondents

Argued on: 19.02.2021

Decided on: 06.07.2021

Janak De Silva J.

The Plaintiff filed this action in the District Court of Kegalle seeking to partition two contiguous lands called Narangahamulahena containing in extent 12 lahas of paddy sowing and Kalahugahamulahena containing in extent 3 pelas and 5 lahas of paddy sowing.

The dispute between the parties related only to the devolution of title to the corpus.

The learned District Judge upheld the pedigree pleaded by the Plaintiff. Aggrieved by the judgment of the learned District Judge, the 3rd and 10th Defendants-Appellants-Appellants (hereinafter referred to as "Appellants") and the 4th and 5th Defendants-Appellants-Respondents appealed to the High Court (Civil Appeal) Sabaragamuwa Province holden at Kegalle.

By judgment dated 30.08.2010, the appeal was dismissed by the High Court and hence this appeal. Court has granted leave to appeal on the following questions of law:

(a) Has the High Court erred by holding that apart from the oral testimony of the 3rd Defendant there is no evidence to arrive at the conclusion that Siyathuhamy was a child of Menik Ethana, because the judgment in the earlier partition case between the parties, namely Case No. 1661/P, produced marked P15 upholds the same position (pp. 508-509)?

(d) Did the High Court come to the finding that the Defendant-Appellants had not established prescriptive possession of the respective lots, in that the High Court only considered the law relating to prescription contained in certain decided cases, but not the evidence led in this case?

(e) Had the Defendant-Appellants established by oral and documentary evidence led in this case the devolution of title set out in their amended statement of claim?

I will address the issues raised in the same order. The first point to be considered is the maternity of Siyathuhamy and the second is whether the necessary conditions to establish prescription among co-owners have been fulfilled.

The pedigree pleaded by the Appellants was based upon Menik Ethana being the mother of Siyathuhamy which fact was contested by the Plaintiff.

The best evidence of this fact in issue would have been the birth certificate of Siyathuhamy. The evidence indicates that he was born sometime in the 1830s. Due to the absence of a formalized system of registration of births in the country at that time, no adverse inference should be drawn against the Appellants for the failure to produce the birth certificate of Siyathuhamy.

The learned counsel for the Appellants submitted that there was a previous partition action in the District Court of Kegalle bearing No. 1661/P between the parties where it was held that Menik Ethana is the mother of Siyathuhamy and that this finding was disregarded by the High Court. I observe that the evidence in that case as to the mother of Siyathuhamy was inconsistent and various documents suggested that the name of the mother was Menik Ethana, Kuda Ethana or Dingiri Ethana. Upon a careful examination of the judgment in D.C. Kegalle 1661/P (P15), I find that the learned District Judge did not come to any definitive finding that Menik Ethana is the mother of Siyathuhamy. On the contrary he proceeds to hold that irrespective of the name of his mother, Siyathuhamy inherited a share of the corpus on maternal inheritance.

The learned counsel for the Appellant further submitted that the death certificate of Siyathuhamy (4D4) indicated that his mother was Henaka Ralalage Menik Ethana which fact was also overlooked by the High Court. This raises an important question *viz.* the relevancy and probative value of the details of the father or the mother contained in the death certificate of the deceased.

The registration of births and deaths was first brought within a legislative framework by Ordinance No. 18 of 1867 which was repealed by Ordinance to Amend the Laws on Registration of Births and Deaths No. 1 of 1895. The death certificate of Siyathuhamy (4D4) was issued in terms of this Ordinance. Section 42 therein mandates that a certified copy of a death certificate shall be received as prima facie evidence of the birth or death or still-birth to which it refers without

any further or other proof of such entry. This is descriptive of the probative value of the details of the birth or death or still-birth only. Ordinance No. 1 of 1895 did not give any probative value to other details contained in a death certificate.

The present law relating to the registration of births and deaths is contained in Births and Deaths Registration Act No. 17 of 1951 as amended. Section 57 therein mandates that a certified copy of a death certificate shall be received as prima facie evidence of the birth or death or still-birth to which it refers and applies to death certificates issued under Ordinance No. 1 of 1895 as well as this Act. This is descriptive of the probative value of the details of the birth or death or still-birth only. Thus, the Births and Deaths Registration Act No. 17 of 1951 as amended also did not give any probative value to other details contained in the death certificate.

Accordingly, I hold that the probative value of the contents of a death certificate issued under both Ordinance No. 1 of 1895 and Births and Deaths Registration Act No. 17 of 1951 is limited in terms of those two enactments to the details of the birth or death or still-birth to which it refers and applies to. The two enactments do not confer any probative value to any of the other details contained in a death certificate. Hence the details of the mother of Siyathuhamy contained in his death certificate (4D4) have no probative value in terms of those two enactments.

However, it does not necessarily mean that this information has no relevancy in terms of the Evidence Ordinance. Its relevancy depends on sections 32(5) and 32(6) of the Evidence Ordinance, which deal with the proof of relationship by blood, marriage or adoption between deceased persons, and section 50 of the Evidence Ordinance which deals with the relationship of one person to another.

Upon an examination of these provisions, I am of the view that the details of the mother of Siyathuhamy contained in (4D4) may be relevant only if the required conditions in section 32(5) of the Evidence Ordinance are satisfied as the other provisions have no application to the details of the paternity or maternity contained in the death certificate.

Section 32(5) of the Evidence Ordinance reads:

> "When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage, adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

According to the death certificate of Siyathuhamy (4D4), the details contained therein were provided by one Henaka Ralalage Dingiri Banda who is described therein as a close relative. Whilst this information has been provided *ante litem motam*, no evidence has been led as to the special means of knowledge of Dingiri Banda about the family details of Siyathuhamy. The importance of establishing the special means of knowledge of the person providing the information was emphasized in *Chellammah v. Vyravan Kanapathy and Others* (65 N.L.R. 49) where the Privy Council did not act on the details of the mother of the deceased included in the death certificate as it was never proved from whom that information came. Therefore, I hold that the details of the mother of Siyathuhamy set out in the death certificate (4D4) are not relevant in terms of section 32(5) of the Evidence Ordinance.

In any event, the mere fact that Dingiri Banda is identified as a close relative of Siyathuhamy is insufficient by itself to make the information about his mother relevant in terms of section 32(5) of the Evidence Ordinance in view of the contradictory nature of the evidence before court on this issue.

In particular, I observe that in deed No. 16288 (2V5), the vendor of which is Siyathuhamy, the recital states that Siyathuhamy became the owner on maternal inheritance from his mother Kuda Ethana. This is relevant, as an admission, in terms of section 21 of the Evidence Ordinance or in terms of section 32(5) of the Evidence Ordinance due to the special knowledge of Siyathuhamy.

Indeed, such evidence would be very strong evidence of the family relationship as decided in *Cooray v. Wijesuriya* (62 NLR 158 at 162) where Sinnetamby J. stated:

> *"It is a practice with some notaries to recite the vendor's title in the deed they attest. For instance, a deed may recite that the vendor's title to a share is derived by inheritance from a deceased father and the father's name is given. Such a recital being a statement made by a deceased vendor having special means of knowledge and made ante litem motam would be admissible to establish relationship: in fact it would be very strong evidence of the family relationship."*

On the contrary, deed No. 15345 (4V1) tendered on behalf of the 4th Defendant-Appellant-Respondent, where also the vendor is Siyathuhamy, the recital does not identify the mother of Siyathuhamy although it is claimed that he derived title to the land on maternal inheritance.

The burden of proof of the pedigree pleaded by the Appellants was on them. Consequently, they should have proved that Menik Ethana was the mother of Siyathuhamy. Although the Appellants placed much reliance on the death certificate of Siyathuhamy (4D4), its probative value is limited to the details of the death. The fact that his mother is identified as Menik Ethana in the death certificate (4D4) is irrelevant as the required conditions in section 32(5) of the Evidence Ordinance are not met. The learned District Judge in the judgment in D.C. Kegalle 1661/P (P15) did not come to any definitive finding that Menik Ethana is the mother of Siyathuhamy.

For the foregoing reasons, I hold that the Appellants have failed to prove that Siyathuhamy was the son of Menik Ethana.

On the issue of prescription, the case of the Appellants, in terms of points of contest 44 and 46, is that they have prescribed to lot 5 in plan No. 979 and lot 7A in plan No. 979A. Where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights [*Chelliah v. Wijenathan et al* (54 N.L.R. 337)]. In their statement of claim, the Appellants claim to have possessed these two lots for more than 60 years prior to the institution of the action in 1983 after an amicable partition. Hence it was incumbent on the Appellants to prove that at least by 1933 they had prescribed to the lots claimed by them.

The legal position on prescription among co-owners is well-settled. In *Corea v. Iseris Appuhamy* (15 NLR 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. In *Tillekeratne v. Bastian* (21 NLR 12) it was held that it was open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that possession originally that of a co-owner had since become adverse. Whether the presumption of ouster is to be drawn or not depends on the circumstances of each case.

The preliminary plan no. 979 indicates that lot 5 had defined boundaries at the time of the survey. The fact that co-owners possessed lots having defined boundaries on the ground has probative value indicating that an amicable partition may indeed have taken place amongst the co-owners. However, in my view this by itself is not conclusive of a change of circumstances amounting to an ouster required to put an

end to co-ownership. Indeed, there is other evidence available in this case which negates any such conclusion.

In *Abdul Majeed v. Ummu Zaneera* (61 N.L.R. 361) De Silva J. with Fernando J. agreeing held that in considering whether or not a presumption of ouster should be drawn by reason of long-continued possession alone, of the property owned in common, it is relevant to consider *inter alia* documents executed on the basis of exclusive ownership. However, I observe that in this case evidence of the execution of several deeds over a period of nearly fifty years indicates the contrary. Several deeds executed after 1933 by the co-owners, such as deed No. 1999 (P4) executed in 1935, deed No, 2779 (P5) executed in 1940, deed No. 13100 (2V2) executed in 1946, deed No. 6120 (P7) executed in 1960, deed No. 3745 (P6) executed in 1965, deed No. 21744 (4V6) executed in 1967 and deed No. 927 (P8) executed in 1972 describe their share of the corpus as undivided shares which indicate that the co-owners continued to consider the corpus as co-owned.

Furthermore, the preliminary survey plan prepared in 1985 indicates that admittedly there was common plantation ranging from 20 to 50 years in the several lots identified therein which in my view negates any presumption of ouster by long possession beginning from 1933.

For the foregoing reasons I hold that the Appellants have failed to establish that the co-ownership came to an end by amicable partition and them prescribing to the lots claimed by them. I agree with the conclusion of the learned High Court Judge that the only conclusion one could arrive at from the evidence adduced in this case is that the co-owners possessed the corpus in separate lots for the convenience of possession and not with the intention of ending the co-ownership.

Therefore, I answer all three questions of law in the negative.

Accordingly, I affirm the judgment of the learned District Judge of Kegalle dated 16th September 2008 and the judgment of the High Court (Civil Appeal) Sabaragamuwa Province holden at Kegalle dated 30th August 2010 and dismiss this appeal with costs. The Registrar is directed to take steps accordingly.

The Substituted Plaintiff-Respondent-Respondent shall be entitled to his costs both in the High Court (Civil Appeal) Sabaragamuwa Province holden at Kegalle and in this court.

Appeal dismissed.

Judge of the Supreme Court

L.T.B. Dehideniya, J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court