IN THER SUPRERME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Inoka Sulari Nissanka
121/C,
Kaluwairippuwa west,
Katana.
Plaintiff

SC Appeal No. 104/2015
NWP/HCCA/KUR/93/2008F
DC/Kuliyapitiya Case no.12857/P

Vs.

1. Stela Karmon Nissanka,
   121/C,
   Kaluwairippuwa West,
   Katana.
2. Nissanka Appuhamilage Kema Senehelatha Nissanka,
   No.382, Kandurugashena,
   Kuliyapitiya.
3. G. G. Krishantha Sisira Pathirana,
   No.382, Kandurugashena,
   Kuliyapitiya.

Defendants

AND

Nissanka Appuhamilage Kema Senehelatha Nissanka,
No.382, Kandurugashena,
Kuliyapitiya.
2nd Defendant-Appellant

G. G. Krishantha Sisira Pathirana,
No.382, Kandurugashena,
Kuliyapitiya.
3rd Defendant-Appellant

Vs

Inoka Sulari Nissanka
121/C,
Kaluwairippuwa west,
Katana.
Plaintiff-Respondent

Stela Karmon Nissanka,
121/C,
Kaluwairippuwa West,
Katana.
1st Defendant-Respondent

AND NOW BETWEEN
G. G. Krishantha Sisira Pathirana,
No.382, Kandurugashena,
Kuliyapitiya.
Substituted 2nd Defendant-Appellant-Appellant

G. G. Krishantha Sisira Pathirana,
No.382, Kandurugashena,
Kuliyapitiya**.**
3rd Defendant-Appellant-Appellant

Vs

Inoka Sulari Nissanka
121/C,
Kaluwairippuwa west,
Katana.
Plaintiff-Respondent-Respondent

Stela Karmon Nissanka,
121/C,
Kaluwairippuwa West,
Katana.
1st Defendant-Respondent-Respondent

BEFORE: L. T. B. Dehideniya, J.
S. Thurairaja, PC, J.
E. A. G. R. Amarasekara, J.

COUNSEL: C. J. Ladduwahetty for the Substituted 2nd and 3rd Defendants-Appellants-Appellants.
Lionel K. Patabendi with Asela Patabendi for the Plaintiff-Respondent-Respondent.

ARGUED ON: 11.02.2020

DECIDED ON: 11.01.2023

E A G R Amarasekara, J.

The partition action relevant to this appeal was filed by the Plaintiff-Respondent-Respondent (hereinafter sometimes referred to as the Plaintiff) in the District Court of Kuliyapitiya to partition the land called "Ambagahamulawatte" of A: 0 R: 1 P: 30 in extent which was more fully described in the scheduled to the plaint dated 12.03.2001. Admittedly, the original owner of the said land was one Nissanka Appuhamilage Don Daniel Nissanka who died leaving as his heirs, his daughter the 2nd Defendant-Respondent-Respondent, Khema Senehelatha Nissanka (hereinafter referred to as the 2nd Defendant) and his son, Sisira Siriwimal Nissanka. The original owner was the grandfather of the Plaintiff and the 3rd Defendant-Respondent-

Respondent (hereinafter referred to as the 3rd Defendant). He was also the father-in-law of the 1st Defendant-Respondent-Respondent (hereinafter referred to as the 1st Defendant). The Plaintiff is the daughter of the 1st Defendant and 1st Defendant was married to Sisira Siriwimal Nissanka, the son of the original owner who died leaving the 1st Defendant (his wife) and the Plaintiff (his daughter) as his heirs. The 3rd Defendant is the son of the 2nd Defendant. Upon the demise of the original owner a testamentary case was filed in the District Court of Kuliyapitiya and the 2nd Defendant has been appointed as the administrator. The above facts were not disputed. No dispute has arisen as to the identity of the corpus. Thus, under the normal course of events, with demise of the original owner, the property which belonged to the original owner should devolve on his daughter (2nd Defendant) and his son, Sisira Siriwimal Nissanka in equal shares, namely undivided ½ of the property to each of them, and with the demise of Sisira Siriwimal Nissanka his ½ share should devolve equally on the Plaintiff and the 1st Defendant giving each of them ¼ share of the property. Since the 2nd Defendant has executed the deed of gift no.3085 dated 05.11.1999, 2nd Defendant's share should go to the 3rd Defendant subject to the life interest of the 2nd Defendant.

As against the position taken up by the Plaintiff which is compatible with the devolution of title described above, the 2nd and 3rd Defendants have claimed prescriptive title to the entire property described in the schedule to the plaint. The position taken up by the 2nd and 3rd Defendants is that there was an agreement between the children of the original owner, namely the 2nd Defendant and Sisira Siriwimal Nissanka. As per the agreement they say that the 2nd Defendant and her brother agreed;

a) to sell the property called "Mahamaligashena" which was at Puttalam to settle the debts of the original owner, especially the debts to the Agricultural and Industrial Credit Corporation of Ceylon and
b) after such sale, to give the rest of the property at Puttalam to Sisira Sriwimal Nissanka and to give the property in dispute to the 2nd Defendant to retain as her own.
c) the balance to be shared by the 2nd Defendant and her brother Sisira Siriwimal Nissanka.

The evidence led at the trial shows that other than the subject matter of the partition action related to this appeal and the land at Puttalam mentioned above, there had been another

property called Veehena that belonged to the original owner which has been partitioned through an action filed in the district court of Marawila.

The decisions of the courts below indicate that the learned judges of those courts, namely the judge of the District Court of Kuliyapitiya and the learned High Court Judges of the Provincial High Court of Kurunegala hearing Civil Appeals, have come to the conclusion that exchange of property as described above has not been proved by the 2nd and 3rd Defendants. Thus, the District Court has decided to partition the land in dispute by refusing to accept the stance taken by the 2nd and 3rd Defendants and the said decision of the District Court has not been interfered with by the learned High Court Judges sitting in appeal over the said decision of the District Court.

Being aggrieved by the decision of the Provincial High Court of Kurunegala, the 2nd and 3rd Defendants have come before this court and leave has been granted on the questions of law mentioned in paragraph 26(a) and (f) of the petition dated 07.11.2014. The said questions of law are mentioned below;

> *"a) Did the learned District Judge disregarded or ignore his own findings of facts in coming to his conclusion of law on the question of prescription of the 2nd and 3rd Defendants?*
>
> *f) Did the learned High Court make a serious error regarding the law of ouster when they held that the presumption of prescription would not arise in this case?"*

It is true that the evidence led at the trial indicates that the 2nd and 3rd Defendants were in possession of the land in dispute after the death of the original owner for about 27 years. As per the pedigree which is not in dispute, the 2nd Defendant became a co-owner. In law the possession of a co-owner is the possession of the other co-owners. It is not possible for one co-owner to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster is needed to prove the commencement of an adverse possession against the other co-owners- Vide **Corea V Appuhamy 15 NLR 65**. Thus, it is necessary for a co-owner who comes to possess a land as a co-owner to prove how his possession became adverse to the possession of the other co-owners. In this regard, the co-owner who claims prescription must place evidence to prove the commencement of adverse possession by proving ouster or something equivalent to ouster or place evidence sufficient

to presume that ouster has taken place 10 years prior to filing the action. If it is a very long possession that has commenced prior to the time that is within the knowledge of the available witnesses, and if the nature of the possession indicates that the relevant party has been in possession as sole owner, it is reasonable for a court to presume the existence of an adverse possession. However, in the case at hand, the 2nd Defendant became a co-owner after the death of her father, the original owner. Then if anything similar to ouster took place it has to be within her knowledge and, if she intends to claim prescriptive title to the co-owned land, she should prove ouster or circumstances similar to ouster. This is especially so, when one considers the family relationship between the parties and the fact that one party resided at Puttalam considerably away from the disputed land. Unless ouster or something similar to that is proved, such facts may encourage a court to presume that the possession is permissive or that the possession of the 2nd and 3rd Defendant is also the possession of the other co-owners who resided at Puttalam. As held in **Sideris V Simon 46 NLR 273**, in an action between co-owners the question whether a presumption of ouster may be made from long and undisturbed and uninterrupted possession is one of fact, which depends on the circumstances of each case. As per **Abdul Majeed V Ummu Zaneera 61 NLR 361**, among other things, the relationship of the co-owners and where they reside in relation to the situation of the property are relevant matters that should be considered in whether a presumption of ouster should be drawn or not. It is natural in our culture if co-owners reside in different places, one co-owner or few of them to enjoy the co-owned property till the co-ownership is terminated.

As mentioned above, the 2nd Defendant, after the death of her father, started possession as a co-owner and it should be within her knowledge if she started to possess adversely. Thus, she should be able to prove ouster or something similar to ouster if such an event took place. Coupled with that, the relationship between the parties and the distance of residence of the Plaintiff and the 1st Defendant to the situation of the property in issue make it difficult to presume ouster or a commencement of an adverse possession merely because of the 2nd and 3rd Defendants are in possession for a period of 27 years or so.

Hence, I now consider whether the 2nd and 3rd Defendants were able to establish ouster or the commencement of adverse possession against the Plaintiff and the 1st Defendant through the other evidence led before the trial judge. In this regard the 2nd Defendant and the 3rd

Defendant rely on the purported agreement mentioned above between Sisira Siriwimal Nissanka who was the father of the Plaintiff and the husband of the 1st Defendant. If such an agreement to exchange the balance of the Puttalam land with the land in issue was in existence, 2nd Defendant should have started adverse possession prior to the death of the said Sisira Siriwimal Nissanka. However, the evidence given by the 2nd Defendant on 26.02.2008 at pages 3 and 4 of the District Court proceedings (pages 159 and 160 of the brief) stands against the stance taken up by the 2nd Defendant. There she admits that after the death of her brother the ½ share of the land in question devolved upon his daughter and wife, namely the Plaintiff and the 1st Defendant. If, she and her brother terminated the co-ownership by an agreement with her brother to exchange the properties after settling the loans of her father, the property in question cannot be a co-owned property to be inherited by the Plaintiff and the 1st Defendant. She further admits in her evidence that there was no written agreement (See page 160 of the brief which is page 4 of the District Court proceedings of 26.02.2008). If there was no agreement attested by a Notary relating to exchange of land, it cannot be a valid agreement. On the other hand, if her position is that she commenced adverse possession after an oral agreement with her brother that cannot stand as she admits the title of the wife and the child of the brother after his death. While admitting title of another at a given time one cannot maintain that her/his possession was adverse to them at that time. Thus, her own evidence is contrary to the position that she commenced adverse possession following the agreement with her deceased brother to exchange lands of Puttalam and Kuliyapitiya.

The 2nd Defendant in her evidence has also stated that she and the heirs of Sisira Sriwimal Nissanka, namely the Plaintiff and the 1st Defendant became the co-owners of the entirety of the land in Puttalam which was 100 acres in extent excluding the 2 acres acquired by the State (see pages 122 and 135 of the brief). Though, there was an agreement entered between heirs of the original owner and one Joseph M Perera to sell some land and settle the loans of their father, they could not sell property as agreed by the said agreement- vide pages 126, 135 to138 of the brief. Thereafter, she states that 50 acres were sold to settle the loans due from the estate of the deceased father and she and her brother became the heirs to the balance 50 acres - vide pages 138 and 139. She has further stated that after the death of her brother, his wife the 1st Defendant possessed the balance 50 acres at Puttalam and 1st Defendant has

sold those 50 acres by two deeds and she did not take any steps against that even though she had lawful right to 25 acres since she had completely handed over the said property to her brother vide pages 138 to 144 of the brief. It must be noted that if she says that she had a lawful right to 25 acres of land in Puttalam after the death of her brother it is contrary to her original stand which was to indicate that her adverse possession commenced following an agreement with her deceased brother by exchanging properties at Puttalam and Kuliyapitiya. As mentioned earlier, such an agreement is not valid unless executed in writing before a notary. The above position taken up while giving evidence by the 2nd Defendant indicates that her purported adverse possession did not commence even based on an oral agreement when her brother was among the living by giving him balance 50 acres in Puttalam and she taking the possession of Kuliyapitiya land as her own. Her version indicated through evidence states that she became an owner of 25 acres of the land in Puttalam after the death of her brother but relinquished her rights to that property to own the property in Kuliyapituya as her own, owing to the agreement with her brother which is invalid before law in terms of section 2 of the Prevention of Frauds Ordinance. If she had commenced adverse possession after the heirs of her brother became co-owners based on an agreement that adverse possession has to be based on an agreement between her and the heirs of her brother. Otherwise, she has to prove some other overt act from which she commenced her adverse possession. There is no such agreement between her and the heirs of her brother produced before court. A party cannot commence adverse possession with a secret intention. Other than the purported agreement between the 2nd Defendant and her brother, no other overt act has been referred as the commencement of adverse possession.

On the other hand, the deed no.169 dated 18.08.77 executed by her to sell 50 acres of the land in Puttalam does not indicate that she sold it as the administrator of the estate of the father to settle the loans due from the estate of the deceased father. She has sold her rights as the owner of a divided 50 acres of the Puttalam land for a consideration of Rs.33000.00.

In the schedule of the said deed, boundary to the east has been described as the land belonging to the heirs of Sisira Siriwimal Nissanka which means the Plaintiff and the 1st Defendant. As per the attestation, out of said consideration, Rs.24000.00 has been paid to her and only Rs.9000.00 has been retained by the vendee to pay the installment due to

Agricultural and Industrial Credit Corporation loan. As per the evidence led at the trial, the estate of the deceased father of the 2nd Defendant had cash worth of Rs.12798.00 while there were liabilities of Rs 68,048/- as payment due to the State and Rs. 26250/- as payment due to Agricultural and industrial development Corporation- vide page 172 of the brief. Further, as per the evidence at pages 173 and 176 of the brief, on 10.06.1982, the 2nd Defendant had stated before the judge in the testamentary proceedings that she had already paid Rs.23126/- of the above mentioned Rs.26250/-. She has further undertaken to pay the balance without burdening the Plaintiff and the 1st Defendant of the present action. As per the evidence at pages 174 and 175, it appears that the testamentary case is not yet concluded and devolution properties of the estate has not been yet tendered to the said court. Even the Attorney-at-Law and Notary public who attested the said deed has stated in evidence that he was not aware about any testamentary case pending- vide page 116 of the brief. Thus, it is clear, the 2nd Defendant sold the 50 acres not as the administrator but as the owner of a divided 50 acres of the land in Puttalam and paid only a portion of the loan by selling it.

Similarly, as per the evidence led at the trial, balance 50 acres of the land in Puttalam has been sold by the heirs of the said Sisira Sriwimal Nissanka- vide evidence at pages 104,105, 140,141,142,143 and 144 of the brief. Deed no.175 dated 26.04.1978 is the deed by which the 1st Defendant sold her rights in 25 acres in the land in Puttalam. As per the attestation, out of the consideration of Rs.18000/-, Rs.13153/- has been paid to the Agricultural and Industrial Corporation. Thus, it is clear that even the heirs of the brother of the 2nd Defendant took part in paying the loan of the estate of the deceased father of the 2nd Defendant. Further it appears that, when the 2nd Defendant stated to the District Court hearing the testamentary action that she has paid Rs.23126/- of the loan to the Agricultural and Industrial Corporation, the sum paid by the 1st Defendant is also included in that sum.

However, the evidence referred to above indicates that the 2nd Defendant and the heirs of her brother dealt with their entitlement in the Property in Puttalam separately and the 2nd Defendant treated her portion of land as a divided portion even when executing the deed of sale for her portion and she executed the said deed as the owner of the 50 acres and not as the administrator to sell part of the estate to settle a loan. It is also evinced that both parties have contributed to settle the loan to Agricultural and Industrial Corporation. The said

evidence is not compatible with the position that the 2nd Defendant sold 50 acres to settle the loans of the deceased father and she gave her 25 acres that should come to her from the land in Puttalam in lieu of the land in Kuliyapitiya, the subject matter of the partition action related to this appeal. Thus, the 2nd Defendant's stance regarding such exchange of lands and selling of 50 acres from the estate to settle the loan is not reliable. The 3rd Defendant was not a party to such agreement if there was any, and he cannot speak to the truth of it and he in his evidence-in-chief itself has said that he knows nothing about the testamentary case.

On the other hand, as per the evidence referred to above, it appears still the testamentary action is not concluded. The 2nd Defendant is the administrator who holds responsibilities as a fiduciary towards all the heirs. As far as she remains the administrator of the estate of the deceased father, she has to manage the properties belonging to the estate of the deceased for the benefit of the heirs subject to her duties as the administrator. Thus, not only as a co-owner but also as a fiduciary she must prove ouster or something similar to that to claim prescriptive rights against other heirs to a property belonging to the estate of the deceased. As explained above she has failed in proving such ouster or commencement of adverse possession from some event similar to ouster.

The 2nd and 3rd Defendants in their written submissions have referred to certain answers given by the Plaintiff while giving evidence. At page 103 of the proceedings, when it was suggested to the Plaintiff that 2 acres of the land in Puttalam was acquired by the State and 50 acres of it were sold to settle the loans of her grandfather, she has answered admitting that, and learned District Judge has referred to that admission in his judgment-vide page 192 of the brief. At page 105 of the brief the Plaintiff has stated that after the death of her father the land was possessed by them after a division caused through the intervention of court. The learned District Judge has referred to this statement of the Plaintiff at page193 of the brief. For the following reasons, this court or a court below cannot rely on those answers.

- Even the father of the Plaintiff was a minor when the testamentary case was filed and the Plaintiff was only 2 years when her father died. Thus, she cannot give evidence with first-hand knowledge of such facts relating to any agreement to sell 50 acres to settle loans of her grandfather. She must have come to know about that from another source and such source is not before court to test the truth of it. On the other hand,

as explained above the deeds executed by the 2nd Defendant and the 1st Defendant and the other evidence before this court do not support that there was such settlement but indicate that the parties have dealt separately with regard to their rights in the land in Puttalam. Moreover, both parties had paid the loan and it appears that it was the mother of the Plaintiff (1st Defendant) who contributed more towards paying the loan.

- If there was any decision to divide the properties among the parties through a court, it has to be in writing and no such decision, permission or direction is placed as evidence at the trial. No oral evidence of the Plaintiff who seems to have no personal knowledge can be accepted for what should have been in writing unless it is proved that primary evidence is destroyed or not available and the Plaintiff has first-hand knowledge of such decision, permission or direction.
- It is not uncommon in Sri Lanka that co-owners amicably possess different parts of the co-owned property for convenience without terminating their co-ownership. The Plaintiff through whatever the admissions or statements made as above has not admitted such division was with the intention of terminating the co-ownership to give exclusive ownership to separated parts of the estate of the deceased grandfather.

The 2nd and 3rd Defendants try to fault the Plaintiff and the 1st Defendant for not calling the 1st Defendant to give evidence. There is no evidence to say that she was a party to or she witnessed the purported oral agreement between the 2nd Defendant and her brother. On the other hand, as elaborated above the evidence including the documentary evidence make the version of the 2nd and 3rd Defendants unacceptable. Moreover, the burden of proving prescriptive title is on the 2nd and 3rd Defendants who claim prescriptive title. Besides, the presumptions such as;

- A co-owner's possession is the possession of other co-owners,
- When a possession of a person may be referable to a lawful title, that person is presumed to possess by virtue of his/her lawful title,
- A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity,

stands for the benefit of the Plaintiff and the 1st Defendant. As such, the 2nd and 3rd Defendants should have proved ouster or something equivalent to ouster to prove the change of their status in relation to the subject matter of the partition action related to this appeal and to prove their adverse possession. As explained above, the 2nd and 3rd Defendants have not placed reliable and sufficient evidence to prove or presume ouster. Evidence led at the trial indicates that it is more probable that there had been an amicable partition of the land at Puttalam but not an exchange of lands between parties. Thus, I cannot find fault with the conclusions reached by the learned High Court Judges or the learned District Judge.

Hence, the questions of law quoted above have to be answered in the negative and in favour of the Plaintiff and the 1st Defendant.

Therefore, this appeal is dismissed with costs.

……

Judge of the Supreme Court

L.T.B. DEHIDENIYA, J.

I agree

……

Judge of the Supreme Court

S. THURAIRAJA, J.

I agree

……

Judge of the Supreme Court.